Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

CENTRA, INC.; CAN-AM INVESTMENTS, LTD.; AMMEX, INC.; DURAROCK UNDERWRITERS, LTD.; and MANUEL J. MOROUN,

Petitioners,

v.

CHANDLER INSURANCE COMPANY, LTD.; CHANDLER INSURANCE (BARBADOS) LTD.; CHANDLER (U.S.A.), INC.; NATIONAL AMERICAN INSURANCE COMPANY; CHANDLER AVIATION, INC.; NEBRASKA DEPARTMENT OF INSURANCE; and DEAN WITTER TRUST, INC.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
Rule 14.1(2)

1. May a state insurance regulator restrict interstate stock sales, usurp federal SEC authority, and deprive a U.S. citizen of the right to sell securities traded on the NASDAQ market and issued by an international corporation?

2. Does devolution to the states of control over "the business of insurance" empower them to suspend or restrain interstate trading of NASDAQ securities?

3. If NASDAQ securities trades involving international holding company shares are "the business of insurance" subject to regulation by a state insurance official then how far does state power to impact commerce "among the States and with the Foreign Nations" extend?

4. Does the decision of this Court recently issued in *Barnett Bank of Marion County v. Nelson,* 1996 WL 130728, handed down on March 26, 1996, require that a Petition for Writ of Certiorari issue to the Nebraska Supreme Court directing that it reconsider its decision in this case?

PARTIES INVOLVED

Rule 14.1 (b)

Parties Seeking Review

CenTra, Inc., a Delaware corporation

Can-Am Investments, Ltd., a Bahamian corporation

Ammex, Inc., a Michigan corporation

DuraRock Underwriters, Ltd., a Barbados corporation

Manuel J. Moroun, a Michigan citizen

Adverse Parties

Chandler Insurance Company, Ltd., a Cayman Islands corporation

Chandler Insurance (Barbados), Ltd., a Barbados corporation

Chandler (USA), Inc., an Oklahoma corporation

National American Insurance Company, a Nebraska corporation

State of Nebraska and Nebraska Department of Insurance

Dean Witter Trust, Inc.

RULE 29.6 STATEMENT

Parties Seeking Review

CenTra, Inc. is a corporation incorporated in Delaware. Can-Am Investments, Ltd. is a Bahamian corporation. Ammex, Inc. is a Michigan corporation. M. J. Moroun is the policy-dominant shareholder of CenTra, Can-Am and Ammex. DuraRock Underwriters, Ltd. is a Barbados insurance Company. Collectively, they are called "the Petitioners".

CenTra, Can-Am, Ammex and DuraRock are shareholders of Chandler Ins. Co., Ltd.

Adverse Parties

Chandler Insurance Company, Ltd. ("Chandler Cayman") is a holding company organized under Cayman Island corporate law. Chandler Cayman's stock is publicly traded on the U.S. (NASDAQ) stock market. It owns 100% of the stock of Chandler (Barbados), Ltd., and other foreign corporations and businesses. Chandler (Barbados) owns 100% of Chandler USA, Ltd., an Oklahoma corporation. Chandler USA owns 100% of National American Insurance Co. ("NAICO"), a Nebraska corporation. NAICO is a property/casualty insurance company licensed to do business in 44 states.

The Nebraska Department of Insurance, an agency of state government, has state statutory power to regulate insurance companies and their holding company hierarchies to the extent that their commercial activity is the

RULE 29.6 STATEMENT – Continued

"business of insurance" in Nebraska. *Neb. Rev. Stat.* § 44-101.01 (Reissue 1993) This state agency is not empowered to regulate intrastate, interstate, or international securities sales or to prohibit shareholders from selling their insurance holding company stock.

Dean Witter Trust, Inc. is a nominee holding Chandler Cayman shares in trust.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Nebraska Supreme Court's decision, the decision sought to be reviewed, is reported at 248 Neb. 844, 540 N.W.2d 318 (1995). The state district court's decision and the administrative agency's order are unreported. (App. 1).

JURISDICTIONAL STATEMENT

(i) The Nebraska Supreme Court's opinion was filed December 1, 1995. (App. 1). (ii) A timely Motion for Rehearing was overruled on January 4, 1996. (App. 2).

LEGAL PROVISIONS

U.S. Const. Art. I, § 8, provides in pertinent part that "Congress shall have power . . . [t]o regulate Commerce with foreign nations, and among the several states . . . "

U.S. Const. Art. I, § 10, provides that the power to regulate international commerce rests with the Congress.

15 U.S.C. § 1011 *et seq.* (the McCarran-Ferguson Act), provides in part, that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The Act also provides that: " . . . the continued regulation and taxation by the several States of the business of insurance is in the public interest[.] "

The Securities Act of 1933, 15 U.S.C. § 77a – 77zzz, regulates the distribution of securities. The Securities Act of 1933, 15 U.S.C. § 77(c)(a)(1), exempts insurance companies, but not holding companies owning insurance subsidiaries, from registration.

The Securities & Exchange Act of 1934, 15 U.S.C. § 78a – 78jjj, regulates daily market activity, imposes disclosure requirements, and regulates the securities marketplace.

The Market Reform Act of 1990, 15 U.S.C. § 78-l empowers the SEC to summarily suspend trading in securities.

The Nebraska Insurance Holding Company Systems Act, *Neb. Rev. Stat.* § 44-2120 *et seq.* (Reissue 1993), (App. 3) authorizes regulatory control over insurance holding companies. The Act is one state's version of a model act adopted in 48 states.

STATEMENT OF THE CASE

Nebraska's Supreme Court has extended state regulatory authority over insurance holding companies so far that, now, Nebraska's insurance regulator can impose prior restraints on a non-Nebraskan who owns stock issued by an international corporation before the shareholder can sell his stock. This can occur even though the issuing company is not engaged in the business of insurance, and even though the stock transactions would occur

on federally regulated securities markets; these transactions have nothing to do with the insurance business of the international company's Nebraska subsidiary.

This case asks that the Supreme Court decide whether a model state act permits a state insurance regulator to restrict interstate commerce by controlling interstate securities transactions and federally governed securities markets, under the guise of regulating the "business of insurance".

Procedural Background

Before the proceedings leading to this Court were initiated, the Petitioners became involved in a dispute over Chandler Cayman's management plans to take Chandler Cayman off the public securities market in a "going private" leveraged buyout. The Petitioners sought permission from the Nebraska State Insurance Director to control Chandler Cayman's Nebraska insurance subsidiary, NAICO, and prevent the buyout. Chandler Cayman is not in the insurance business; it is simply a holding company that ultimately owns NAICO and other non-U.S. businesses.

The Petitioners' initial administrative action was a request for control made to the state insurance regulator. The question presented was whether the Petitioners would be approved to control NAICO. No counterclaims were filed.

The state insurance regulator ruled against the Petitioners, declaring that he would not permit them to control NAICO; and he went further. No party asked that

Petitioners' right to sell their Chandler Cayman shares be suspended, but the state regulator issued an order, *sua sponte*, prohibiting such a sale without prior approval.

The state District Court affirmed, holding that language in the insurance regulator's Order concerning sale of the Petitioners' securities was merely a notification requirement.

The Nebraska Supreme Court held that the state insurance regulator has authority to impose restrictions upon a shareholder of a foreign corporation owning a domestic insurance subsidiary. These restrictions are so extensive that the Petitioners are now required to obtain the regulator's approval before the shares may be sold to anyone – even the issuing company. The Nebraska Court's vitriolic opinion suggests that the Court utterly miscomprehended the commerce clause questions presented to it.

This case involves securities issued by a foreign corporation, Chandler Cayman, organized under the law of the Cayman Islands, a British protectorate. The stock is traded on the U.S. stock market. Chandler Cayman issued stock to the Petitioners, three companies, incorporated in Delaware, Michigan and Barbados.

Transactions in Chandler Cayman stock will not affect policyholders, premiums, claims, or the business of insurance conducted by NAICO, the distant Chandler Cayman subsidiary domesticated in Nebraska. The only relationship Nebraska has to this entire controversy is that NAICO's articles of incorporation were filed in Nebraska years before Chandler Cayman acquired it.

History of Federal Issues In This Case

Federal issues were first raised in the District Court on administrative review of the insurance regulator's Order refusing to grant the Petitioners' request for permission to control NAICO. The Petitioners sought review under the Nebraska Administrative Procedures Act, *Neb. Rev. Stat.* § 84-920, *et seq*. The Petitioners' pleading to the state District Court alleged:

> The Department's Orders are erroneous in that they impose and extend various restrictions regarding the Chandler stock, including a prohibition regarding disposition of Plaintiff's [sic] Chandler stock, which in its scope is beyond the statutory and constitutional authority of the Department. Particularly, said prohibition invades the exclusive regulatory field of federal securities laws and regulations, and is invalid as violative of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and the Interstate Commerce Clause in Article I, Section 8, Clause 3.

The District Court did not address issues of federal law.

On appeal, the Petitioners raised federal issues in their assignments of error, as required by rules of Nebraska's highest court. *Neb. R. Prac. & Proc.* 9(d). Errors assigned for the Nebraska Court's consideration included:

> IV. The [district] court erred in holding that the Director of the Department [of Insurance] has the statutory authority to order the prohibition restricting the appellants from selling a block of their Chandler Cayman stock.

V. The [district] court erred in holding that the prohibition does not constitute a violation of the interstate commerce clause of the United States Constitution even if said prohibition was within the Department's statutory authority.

The Nebraska Decision was rendered before this Court made its pronouncement in *Barnett Bank of Marion County v. Nelson*, 1996 WL 130728 (March 26, 1996), in which the term "business of insurance" under McCarran-Ferguson was clarified. The Nebraska decision also preceded this Court's ruling on commerce clause issues in *Seminole Tribe of Florida v. Florida*, 1996 WL 134309 (March 27, 1996).

The Nebraska Supreme Court's Decision

The Nebraska Supreme Court stripped the Petitioners of their right to sell their NASDAQ-traded stock without prior state regulatory approval, no matter who the purchaser(s) might be.

No issue concerning the state's authority to regulate securities under its blue sky laws is present here. The Petitioners sought regulatory permission to control NAICO directly. They have owned more than 20% of Chandler Cayman's shares for nearly five years. The Petitioners' right to sell their shares was not placed in issue by their filing with the Insurance Department.

The Nebraska Court held that the state insurance director was authorized to restrain sale of Chandler stock as a part of his power to regulate "the business of insurance" under the McCarran-Ferguson Act. (248 Neb. at 859-864). The decision must be reconsidered in light of *Barnett Bank, supra*. The state Supreme Court improperly

applied tests articulated in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002 (1982), and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970). The Nebraska court misapplied this Court's standards for judging "the business of insurance". It permitted a state insurance regulator, acting *sua sponte* in an administrative proceeding to suspend trading in publicly traded securities issued by an international holding corporation. Federal law confers authority on the SEC, alone, to suspend market activity in publicly traded securities. *The Market Reform Act of 1990*, 15 U.S.C. § 78-l *et seq.* (1990). The court below also ruled in a manner that is not consistent with this Court's unanimous opinion in *Barnett Bank*.

The Underlying Facts

The insurance industry may be the largest single private sector of the American economy. Insurance companies account for more than 25% of all equity capital traded on the New York Stock Exchange. Life companies alone have more than $2 trillion in assets. (Source: NYSE Research Reports, Feb. 1996). In virtually every American city, more commercial real estate is owned or financed by the insurance industry than by banks. Billions of dollars insure risks ranging from slip-and-fall sidewalk incidents to the tangible property of virtually every business and family in the country, and even satellites launched into space. Yet, U. S. constitutional law has proceeded from the historical premise that insurance, originally a business conducted by fraternal organizations, was so local in character that it could not affect interstate commerce. *Paul v. Virginia*, 75 U.S. 168 (1868).

This case presents a circumstance in which a state seeks to use its insurance regulatory power to prevent shareholders of a domestic insurer's publicly-traded international parent from selling shares. Nebraska's decision holds that devolution of regulatory control over "the business of insurance" permits a state to suspend trading in securities subject to SEC regulation.

Recognizing that its insurance costs were rising dramatically in the mid-1980's, CenTra, one of the Petitioners, sought a more efficient way to insure its fleet of trucks. CenTra wanted to negotiate a "fronting" arrangement wherein NAICO would provide an initial layer of coverage with excess coverage reinsured by an unrelated company.

Between 1987 and 1992, the Petitioners acquired direct ownership in Chandler Cayman, and beneficial ownership in the NAICO subsidiary, in three ways: 1) exchanges of NTII stock for Chandler Cayman stock in an initial public offering; 2) direct stock purchases from Chandler Cayman in a secondary offering; and 3) open market purchases on the NASDAQ.

Two significant governmental interests are presented:

- Chandler Cayman is a publicly held corporation and regulated by the federal government through the SEC. Its stock sales constitute interstate and international commerce.
- The insurance business of Chandler's subsidiary, NAICO, requires regulation of premium, reserves and claims practices to protect its policyholders. This regulation occurs at the state level.

The Petitioners became concerned about the adequacy of NAICO's claims reserves, fearing that management was not reserving sufficient funds to pay claims. These concerns about NAICO peaked when Chandler Cayman's management proposed a tender offer for the company's shares, using cash within the chain of corporate ownership, to privatize the holding company at a cost of more than $48 million. The Petitioners opposed management's "going private" buy-out, fearing that their own insurance program would be jeopardized and their Chandler Cayman investment would be plundered. A bitter fight then erupted between the Petitioners and Chandler Cayman's management. In July, 1992, as the controversy was erupting, the Petitioners sought regulatory permission to control NAICO.

The Nebraska insurance regulator refused to allow the Petitioners to control NAICO. Subsequently, the Nebraska Supreme Court held that the Petitioners (1) were unable to control NAICO; (2) could not acquire additional Chandler shares; and (3) cannot sell their stock without regulatory approval. The Nebraska court's order does not require that the insurance regulator approve a *purchaser* who seeks to buy the Petitioners' stock. Rather, it regulates the Petitioners' interests as prospective *sellers* of NASDAQ-traded securities. Absent presidential action in times of national crisis, or SEC restraints, no other legal authority known to Petitioners has ever authorized regulation of a *seller's interests* in stock. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

The impact of Nebraska's assault on interstate commerce permits state regulatory dominion to reach the securities of virtually every publicly traded company.

Nearly every major corporation has at least one captive insurance subsidiary.

Simple illustrations may be made of the risks posed by allowing Nebraska's ruling to stand. If Sears or Allstate (a single company until recently) had owned a single small insurance subsidiary domesticated in Nebraska, the Nebraska insurance regulator could have prevented Sears and Allstate from splitting into distinct corporate entities. Or, if General Electric, the nation's largest publicly-traded corporation, owns a Nebraska insurance subsidiary, the state court ruling will permit the insurance regulator to suspend trading in General Electric shares on the New York Stock Exchange – shares with average daily trading volume of more than $250 million. This ruling would, if allowed to stand, eviscerate the role of the SEC, at least as a regulator of securities issued by insurance holding companies.

The facts presented by this Petition for a Writ of Certiorari give rise to issues of substantive national importance.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted, and the United States Supreme Court should review, reverse, and correct the erroneous judgment of the Nebraska Supreme Court for these independent, substantial reasons:

1. The state court has decided a federal question in a way that conflicts with decisions of this Court, other

state courts of last resort, and several United States Courts of Appeals.

2. If allowed to stand, the Nebraska court's decision will permit a state to regulate national securities markets, and transactions in publicly traded securities issued by international companies, even where there is no active state interest present.

3. The Nebraska court's ruling threatens to permit devolution of control over a significant segment of the public securities markets (i.e., all insurance holding companies issuing public shares) to the states, and away from the federal government.

4. The Nebraska decision must be reconsidered in light of this Court's ruling in *Barnett Bank v. Nelson, supra.*

1. The Nebraska Decision Is Contrary To U.S. Supreme Court Rulings.

The Nebraska court's decision stands alone in American jurisprudence. It is an aberrant testament to erosion of federal authority to the states, allowing them to restrict the sale of securities traded on national markets without a primary state interest in doing so. Moreover, the Nebraska decision is contrary to decisions of this Court. *See, SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564 (1969); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002 (1982); and *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629 (1982); and *Barnett Bank, supra.* The

Nebraska decision authorizes the state insurance regulator to prohibit *any* sale of Chandler Cayman shares by the Petitioners without prior regulatory approval. 248 Neb. at 864. This opinion sets a new high water mark in the trend of regulatory power devolving to the states.

Recent perceptions of the federal-state relationship suggest that governmental functions, exercised for decades at the federal level, are now devolving to the states. An impending collision over precedent developing a doctrine concerning the "dormant commerce clause," and the proper role of the states, has been foretold by recent decisions of this Court involving commerce clause issues. *Oklahoma Tax Comm'n v. Jefferson Lines*, 115 S. Ct. 1331 (1995) (a 7-2 decision concerning state authority to tax interstate bus tickets); *Tyler Pipe Indus. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987). The intention has been to ensure that each state regulates only its "fair share" of commerce.

Much of the constitutional inquiry reaching this Court has involved tax cases. *Jefferson Lines, supra; Tyler Pipe, supra; Goldberg v. Sweet*, 488 U.S. 252 (1989). These decisions have generated much commentary anticipating a case like the one now presented in this Petition. *See generally*, Faille, *Is The Dormant Commerce Clause Doctrine Zigging or Zagging?* 42 Fed. R. L. 34 (1995); *The Commerce Clause: The Case For Judicial Non-Intervention*, 69 Oregon L. Rev. 895 (1990); Petragnani, *The Dormant Commerce Clause: On Its Last Legs*, 57 Albany L. Rev. 1215 (1994); Lynch, *McCulloch v. Maryland: A Matter of Money Supply*, 18 Seton Hall L. Rev. 223 (Spring, 1988); Collins, *Economic Union as a Constitutional Value*, 63 NYU L. Rev. 43, 55 (1988).

The issue in this case, however, goes beyond the authority of a state to tax without improperly restricting interstate commerce. Here, the question is whether a state may, under the pretext of exercising its police powers, impinge on an area of interstate commerce regulated by the federal government and governed by *an extensive matrix of federal statutes.*

To permit a state to regulate so pervasively would effectively shift regulatory authority over all publicly traded insurance holding companies away from the SEC under the *Securities and Exchange Act of 1934*, 15 U.S.C. § 78 *et seq.*, the *Securities Act of 1933*, 15 U.S.C. § 77 *et seq.*, and the *Market Reform Act of 1990*, 15 U.S.C. § 78-l, to 50 different states. This would happen even though the states have no interest in securities transactions involving insurance holding companies, and even though those transactions will not affect the subsidiary's insurance business.

Since Chief Justice John Marshall announced, in *Brown v. Maryland*, 25 U.S. 419, 448 (1827), that economic union under the constitution is a "vital principle of perpetual operation," it has been unthinkable that a state, with an interest in regulating the localized business of a domestic insurer's relationships with its insureds, might reach through multiple layers of corporate ownership, across state and national boundaries, and beyond federal legislation, to suspend trading in securities exchanged on national markets. James Monroe of Virginia, in the *Federalist No. 32*, wrote that national regulation of commerce was "necessary to preserve the Union; without it, it will infallibly crumble to pieces."

This Court's recent decisions concerning the commerce clause set the stage for the debate that has reached the Court today. In 1992, this Court held that states cannot be required by the federal government to find sites for low-level nuclear waste generated within their borders. *New York v. United States*, 112 S. Ct. 2408 (1992). In 1993, this Court denied certiorari from a First Circuit decision, *Versyss, Inc. v. Coopers & Lybrand*, 982 F. 2d 653 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 2965 (1993), to decide an important corporate-merger issue, and, in the process, commentators have said this Court has "created a gap in the federal system that regulates the securities market." Faille, *supra*, 42 Fed. R. Law. 34, at 36. *See also Note, Federal Securities Law, Versyss, Inc. v. Coopers & Lybrand, the New Corporate-Merger Trick*, 17 W. New Engl. L. Rev. 181 (1995).

Within a month of the *Jefferson Lines* decision, this Court held that the United States cannot prohibit possession of firearms within 1,000 feet of public schools on commerce clause grounds in the absence of legislative findings connecting such regulations with the commerce power. *United States v. Lopez*, 115 S. Ct. 1624 (1995). In March, 1996, this Court unanimously struck down the Florida insurance regulator's efforts to restrict banking activities governed by federal law. *Barnett Bank, supra.*

The authority of Congress to regulate interstate commerce has its source at *U.S. Const.* Art. I, Sec. 8, empowering "Congress to . . . have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Art. I, Sec. 10, Clause 2 provides that "no State shall, without the consent of Congress, lay any Imposts or Duties on Imports or

Exports, except what may be absolutely necessary for executing its inspection Laws . . . and all such Laws shall be subject to the Revision and Control of the Congress."

The commerce clause is not found solely at Art. I, Sec. 8, of the Constitution. Since at least 1868, the impost/duties clause appearing at Art. I, Sec. 10, has been held to prohibit state interference with foreign trade. *Woodruff v. Parham*, 75 U.S. 123 (1868). The perception that the commerce clause must be applied to empower the federal government to control commerce endures. *See Barnett Bank* and *Jefferson Lines, supra.*

The insurance industry had changed so dramatically by 1944 that this Court was compelled to recognize its interstate impact. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S. Ct. 1162 (1944). The McCarran-Ferguson Act (15 U.S.C. § 1011) was passed in reaction to this Court's decision in *South-Eastern Underwriters*. The Act provides, *inter alia*, that:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance:
>
> *Provided*, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business

> of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1011. The legislative history of the McCarran-Ferguson Act reveals specific concern with the relationship between insurance rate-making and antitrust laws, and with the power of the states to tax insurance companies. *Securities & Exchange Comm. v. National Securities*, 393 U.S. 453, 89 S. Ct. 564 (1969). *See*, 91 Cong. Rec. 1087-1088 (remarks of Congressmen Hancock and Celler). As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the State with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." *National Securities*, 393 U.S. at 459, 89 S. Ct. at 568, *quoting* H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

The McCarran-Ferguson Act does not make the states supreme in regulating all activities of insurance companies. Insurance companies engage in many activities that are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does McCarran-Ferguson apply. *National Securities*, 393 U.S. at 459-460, 89 S. Ct. at 568.

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these are the core of the "business of insurance". Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the

> same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder.

Id. at 460, 89 S. Ct. at 568.

2. States May Not Usurp Federal Securities Regulation Of Insurance Holding Companies Under The Guise Of Regulating The Business Of Insurance

The issue in this case is whether a state insurance regulator's order prohibiting a non-resident from selling his stock in an international holding company, regardless of whether the purchaser would acquire a controlling share as defined by Nebraska's Insurance Holding Company Systems Act, regulates the "business of insurance" under McCarran-Ferguson.

The federal government has acted to regulate securities transactions in interstate commerce. Nothing in federal securities law suggests that the federal power over securities markets applies to all stocks traded *except* those of insurance companies.

The Nebraska decision allows the state's insurance regulator to suspend trading of Chandler Cayman's stock by imposing a prior restraint on the Petitioners' sale of those securities. There is no link between the *sale* of stock by the Petitioners and a state interest in regulating "the business of insurance". McCarran-Ferguson, *supra*, was intended to allow states to regulate those matters constituting purely the "business of insurance", *Barnett Bank, supra*. Federal securities laws were designed to secure federal control of interstate, and international, securities

transactions. The Nebraska holding ignores this intention. It misapprehends this Court's precedent, too.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002 (1982), defines this three-part test for evaluating whether an activity relates to the business of insurance:

> *[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

458 U.S. at 131, 102 S. Ct. at 3009.

This Court's earlier decision in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S. Ct. 1067 (1969) also considered what constitutes the "business of insurance" for McCarran-Ferguson purposes. *Royal Drug* held that an insurer's agreements with participating pharmacies to provide benefits to policyholders was not "the business of insurance":

> [T]he benefits promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2.00 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.

Royal Drug, reaffirmed by *Barnett Bank* in 1996, made clear that the "business of insurance" must be viewed narrowly, i.e., matters affecting the spread of risk (premiums, reserves, etc.) or peril insured against (definitions or interpretations of policy provisions) are the "business of insurance". The tripartite test announced in *Pireno*, and

elucidating the Court's holding in *Royal Drug*, leaves no room for doubt that the "business of insurance" permits states to regulate the insurance risk-spreading function, and the insurer-policyholder relationship. *Barnett Bank, Pireno* and *Royal Drug* do not permit state usurpation of federal securities laws. In *Barnett Bank v. Nelson, supra*, this Court held:

> Consider, too, the McCarran-Ferguson Act's basic purposes. The Act sets forth two mutually reinforcing purposes in its first section, namely, that – continued regulation and taxation by the several States of the business of insurance is in the public interest, – and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. U.S.C. 1011. The latter phrase, particularly the word – silence, – indicates that the Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against inadvertent federal intrusion – say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to comprise one part.

1996 WL 130728.

Nebraska's decision marks the first time that any court has held that the "business of insurance" permits a state insurance regulator to suspend trading in an international corporation's stock traded on a national securities market, regulated by the SEC. If NASDAQ securities transactions involving shares of an international holding company are the "business of insurance," subject to regulation by a state official claiming an interest in a domestic

insurance subsidiary, then how far does state power to impact commerce "among the States and with the Foreign Nations" extend?

3. Under *Barnett Bank*, And In Other Decisions, Control Of The Business Of Insurance Does Not Devolve Control Of National Securities Markets To The States

The Nebraska court's opinion fails to distinguish between the insurance regulator's legitimate interest in approving *the purchase* of shares in an insurance holding company system, and the director's lack of interest in restricting *the sale* of shares. As a result, Nebraska has become the first state to allow a state regulator to prohibit a shareholder from *selling* stock by imposing regulatory restrictions upon the seller, rather than requiring that the *purchaser* be approved as a qualified buyer.

Nebraska statutes authorize regulatory restrictions on insurance holding company stock purchases, but not on sales of insurance holding company securities. *Neb. Rev. Stat.* § 44-2126, 44-2127, *et seq.* Chandler Cayman is not engaged in the business of insurance itself. It does not issue policies, establish reserves, appoint agents, or have any relationship to the policyholders of its distant insurance subsidiary, NAICO.

At issue, therefore, is the authority of a state to extend its regulatory tentacles beyond its legitimate interests and into the interstate and international securities markets. These areas are far removed from concerns over policyholders, premiums, rates or the adequacy of reserves to pay insurance claims.

This Court's modern commerce clause decisions make it clear that the states may not engage in unchecked regulation impacting commerce. *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865 (1991), struck down a Nebraska statute imposing motor vehicle taxes on non-residents, and held that suits for violation of the commerce clause may be brought under 42 U.S.C. § 1983. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) struck down an Iowa restriction against 65-foot double-trailer truck lengths that prevented drivers from entering Iowa on the Interstate.

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), held a regulation invalid because it excluded milk produced and pasteurized in Illinois from distribution in Wisconsin. *Hunt v. Washington Advertising Comm.*, 432 U.S. 333 (1977), struck down a regulation that raised costs for foreign interests to the benefit of those within the state of Washington.

And now, *Barnett Bank* holds that states cannot restrict national banks from engaging in actions authorized by federal law. The Nebraska decision, below, miscomprehends all these precedents.

CONCLUSION

Nebraska's highest court has rendered a decision that permits the state's insurance regulator to control transactions in securities issued by an international holding company. This stock is traded on the NASDAQ market – a market actively regulated by the SEC under federal law.

Nebraska's judicial decision has empowered its insurance regulator to impose a prior restraint on the sale of securities and to affect commerce broadly under the guise of the "business of insurance". The decision purports to stem from the state's power to regulate the "business of insurance" under the McCarran-Ferguson Act. Yet, the business of insurance does not include state regulation of interstate securities transactions.

The Nebraska court's decision is diametrically contrary to pronouncements of this Court, and federal statutory law. If permitted to stand, the Nebraska decision will enable states to suspend trading in stock otherwise traded on national markets. The "business of insurance" will become the new way to avoid federal securities regulation. For these reasons, the Petition for a Writ of Certiorari must be granted.

Respectfully submitted,

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APPENDIX 1

Nebraska Supreme Court

CENTRA, INC., A DELAWARE CORPORATION, ET AL., APPELLANTS, V. CHANDLER INSURANCE COMPANY, LTD., A CAYMAN ISLANDS CORPORATION, ET AL., APPELLEES.

___N.W.2d___

Filed December 1, 1995. No. S-93-964.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Alan E. Peterson and Henry E. Pfeiffer, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

William M. Lamson, Jr., Michael J. Dugan, and Raymond E. Walden, of Kennedy Holland DeLacy & Svoboda, and Kenneth N. McKinney, Robert L. Roark, and Mary E. Nelson, of McKinney Stringer & Webster, P.C., for appellees Chandler Insurance Co. et al.

Don Stenberg, Attorney General, and Fredrick F. Neid, for appellee Nebraska Department of Insurance.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This appeal from the Lancaster County District Court arises from a corporate takeover battle wherein the Nebraska Department of Insurance (the department) denied the application of the appellant corporations (applicants) to acquire National American Insurance Company (NAICO). Applicants assign error to two holdings of the district court, which affirmed the decision of the department to deny the application for acquisition.

Applicants allege error in the court's refusal to disqualify counsel for Chandler Insurance Company, Ltd., and its subsidiaries, and in the court's refusal to find that the Director of Insurance exceeded his statutory and constitutional authority in requiring applicants to seek department approval before selling or otherwise alienating their Chandler stock. We affirm.

I. THE PARTIES

CenTra, Inc., is a Delaware corporation whose principal place of business is in Michigan. CenTra is a holding company primarily concerned with motor freight transportation. Its subsidiaries and related entities include Can-Am Investments, Ltd., a Bahamian corporation whose directors are also the directors of CenTra; Ammex, Inc., a Michigan corporation; and DuraRock Underwriters, Ltd., a Barbados corporation and reinsurance company. Ownership and control of each of these entities traces back to one Manuel J. Moroun, an individual who resides in Michigan and who is the president and/or chief executive officer of each of these entities.

NAICO is a Nebraska corporation and a domestic insurer; it is authorized to write property and casualty insurance in Nebraska and 43 other states. NAICO is a wholly owned subsidiary of Chandler (U.S.A.), Inc.; Chandler (U.S.A.), Inc., is an Oklahoma corporation and a wholly owned subsidiary of Chandler Insurance (Barbados), Ltd.; Chandler Insurance (Barbados), Ltd., is a Barbados corporation and a wholly owned subsidiary of Chandler Insurance Company, Ltd., which is a Cayman Islands corporation. The role of Chandler Aviation, Inc.,

in this litigation is unclear, given that neither party explained either on brief or in oral argument what, if anything, Chandler Aviation did that was relevant to these events. All of these parties (collectively, Chandler) were represented throughout this litigation by the Omaha law firm of Kennedy Holland DeLacy & Svoboda (Kennedy Holland), whose disqualification from the case applicants seek, alleging several conflicts of interest.

II. THE EVENTS

The CenTra-Chandler relationship began in 1987, when NAICO began providing reinsurance to CenTra. Under the reinsurance program (also known as a fronting program), NAICO issued a number of workers' compensation, automobile, and general liability insurance policies to cover CenTra and its affiliates. Those policies were then reinsured through Can-Am Underwriters (a now defunct Moroun entity) and its corporate successor, DuraRock Underwriters, thereby allowing NAICO to spread its risk through a contract of indemnity. See, generally, 19 George J. Couch, Cyclopedia of Insurance Law § 80.2 (rev. 2d ed. 1983). At that time, NAICO was owned and controlled by Chandler Insurance Company, Ltd., which in turn was owned by a number of shareholders.

Prior to 1987, none of Chandler's shareholders held more than 10 percent of its outstanding capital stock. In that same year, however, Moroun concluded that CenTra ought to acquire NAICO so as to maximize its control over both its insurance company and the handling of its own claims. Because NAICO was wholly owned by Chandler Insurance, CenTra launched an effort to acquire

Chandler, ultimately acquiring an ownership interest that approximated 22 percent.

That acquisition triggered the scrutiny of the department pursuant to the Insurance Holding Company System Act, Neb. Rev. Stat. §§ 44-2120 to 44-2153 (Reissue 1993) (the Act). (We note that the Act was enacted in 1991, during the course of these transactions, and replaced the previous Neb. Rev. Stat. §§ 44-2101 through 44-2119 (Reissue 1988 & Cum. Supp. 1990). For ease of reference, we use the 1991 version of all statutes cited herein.) Under the Act, "control" of an insurer is presumed to exist if any person, directly or indirectly, owns or otherwise holds 10 percent or more of the voting securities of any other person. § 44-2121(2). The Act further requires that the department must approve the acquisition of control of any domestic insurer. § 44-2126. The approval process requires an applicant to file a "Form A" application for acquisition of control and affords the applicant a hearing before the department, before the department renders its decision. *Id.* Even despite apparent ownership of an insurer, however, the Act allows an acquiring party to escape department scrutiny by filing a disclaimer of control. § 44-2121(2). CenTra filed such a disclaimer in 1989, and the department approved the disclaimer subject to CenTra's voluntary "Standstill Agreement" to cease its stock purchases.

In 1992, an inside management group of Chandler tried to acquire control of Chandler so as to convert it to a privately held corporation. This attempt was aborted when the management group and applicants failed to reach an agreement on what should be their respective ownership interests in Chandler; the management group

ultimately withdrew its tender offer for control of Chandler. In the meantime, CenTra had directed its broker to increase its Chandler holdings by acquiring more Chandler stock from other Chandler stockholders.

Upon learning of CenTra's actions, the department issued a "cease and desist" order to CenTra. CenTra responded by creating a straw corporation, Can-Am Investments, Ltd., whose sole reason for existence apparently was to acquire Chandler stock. Since Can-Am Investments had not been formed at the time of the cease and desist order, applicants argue that Cam-Am Investments was not bound by the order and allowed Moroun to continue his acquisition of Chandler stock by way of this new entity. CenTra and Moroun halted their acquisition efforts only after the department issued a second cease and desist order, revised to include Can-Am Investments. By that point, CenTra had acquired 49.2 percent of all issued and outstanding stock of Chandler. Significantly, only after achieving this quantum of ownership did CenTra file its Form A application for acquisition of control; despite that CenTra's disclaimer of control was approved in 1989, the Form A would have become relevant again upon renewal of CenTra's acquisition efforts in 1992.

Following applicants' Form A hearing in September 1992, the department denied applicants' request. The department based its denial of acquisition on criteria enumerated in § 44-2127. In particular, the department found that the financial condition of applicants could jeopardize the financial stability of the insurer or prejudice its policyholders; that applicants' competence, experience, and integrity were such that their acquisition of

the insurer would not be in the policyholders' best interests; and that the acquisition of the insurer was likely to be hazardous to the public. The department's order included a requirement that applicants seek department approval before disposing of their ownership in any manner.

On de novo review of the substantial record in this case, the Lancaster County District Court affirmed both the department's findings and the scope of its order. Applicants appeal from that decision to this court, seeking a remand of their application with instructions to disqualify Kennedy Holland and to limit the scope of any further orders issued by the department.

III. DISQUALIFICATION OF COUNSEL

Applicants first assign error in the failure by both the department and the district court to find multiple conflicts of interest warranting disqualification of Kennedy Holland from this litigation. Applicants ask this court not only to find that disqualification was proper, but also to find that all proceedings below were inherently erroneous by virtue of Kennedy Holland's representation and, as such, to remand this cause for rehearing without the alleged taint of conflict.

The alleged conflicts arise from three peculiar interactions between Kennedy Holland and the parties to this suit. The first of these interactions was between applicants (in particular, CenTra) and now-Governor E. Benjamin Nelson, who in 1987 worked in an of-counsel relationship for Kennedy Holland. CenTra sought Nelson's advice in 1987 and 1988 as an insurance law

expert. Whether Nelson was also retained as an attorney associated with Kennedy Holland is disputed by the parties; notably, despite that applicants' primary argument for disqualification of Kennedy Holland depends on the truth of their allegations concerning Nelson, little discovery was conducted into the allegations. In an affidavit, Nelson states that he reviewed existing and potential insurance agreements with NAICO with an eye toward whether the department would approve those agreements. CenTra also discussed with Nelson the possibility of nominating him to the NAICO board of directors. CenTra's chief financial officer, Norman Harned, stated in an affidavit that he had told Nelson "about CenTra, the history of our insurance agreements, [and] the reinsurance Can-Am provided to NAICO." Applicants allege no personal impropriety on Nelson's part. Rather, applicants argue that matters reviewed by Nelson for CenTra are substantially related to the matters that now are the subject of Kennedy Holland's representation.

The second interaction applicants cite as grounds for disqualification of Kennedy Holland is that between Chandler and Michael J. Dugan, who is a partner in Kennedy Holland. Applicants allege that Dugan represented the inside management group in its dealings with the department during the management group's 1991 attempt to take control of Chandler and convert it into a privately held corporation. See *Attorney Griev. Comm'n v. Lockhart*, 285 Md. 586, 403 A.2d 1241 (1979) (holding that simultaneous representation of a corporation and of those seeking to purchase its stock is improper).

The third interaction with which applicants find fault is that between Chandler and Dugan, insofar as Dugan

served both as a director of Chandler subsidiary NAICO and as a lawyer for Chandler. Applicants argue that Dugan could not properly balance these competing responsibilities. As a lawyer, Dugan owed a duty of loyalty, including acceptance of the corporate client's judgment on interests and objectives, to the corporate entity under Canon 5, EC 5-18, of the Code of Professional Responsibility. As a corporate director, Dugan had to exercise his independent judgment and act in the best interests of the shareholders. See *ConAgra, Inc. v. Cargill, Inc.*, 222 Neb. 136, 382 N.W.2d 576 (1986).

Applicants also call into question whether Dugan, by virtue of his dual roles as director and lawyer, could both uphold his duty to hold inviolate the secrets and confidences of his clients under Canon 4, DR 4-101(B), of the Code of Professional Responsibility and uphold his affirmative duty of disclosure as a corporate director. See *National Credit Union Admin. Bd. v. Regine*, 749 F. Supp. 401 (D.R.I. 1990). Although little authority supports their contention, applicants claim that the disclosure obligations of a director override the attorney-client privilege. As such, applicants maintain that Dugan's duty as a NAICO director renders him unable to preserve his client's confidences, while his duty as a lawyer for Chandler renders him unable to disclose to other NAICO directors (who include at least one director of CenTra) the material facts he learns in his capacity as an attorney.

This court does not take lightly accusations that a Nebraska law firm has knowingly continued representation where it should withdraw. The courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all

its dimensions. *U.S., Lord Elec. Co. v. Titan Pacific Const.*, 637 F. Supp. 1556 (W.D. Wash. 1986). The weight of our duty does not diminish in response to the profile of the parties or the amount of money at stake in the litigation, for the appearance of impropriety has an even more pernicious effect when the high stakes of the litigation heighten a lawyer's visibility. See *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). We are also mindful that disqualification can wreak considerable havoc on a party's efforts to resolve its dispute. At a minimum, the practical effect is that a party must seek and find new counsel; furthermore, a party may be substantially prejudiced because its new attorney must litigate against an opposing counsel who inarguably is more familiar and more facile with the case. See *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). At the worst, a litigant can use a motion for disqualification as a technique for harassment and delay. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982). Thus, we hesitate from the appellate bench to disqualify counsel and "reward a continuing pattern aimed at frustrating adjudication of the case in district court." *U.S., Lord Elec. Co.*, 637 F. Supp. at 1563.

The potential to gain an advantage in litigation through collateral attack cannot be lost on applicants. Applicants have raised no objections to the department's findings on the merits, and yet applicants ask this court to remand this cause for a second bite at the apple versus different opposing counsel.

For two reasons, disposition of applicants' allegations at this final stage in the litigation process is an imperfect remedy for the claimed evils. First, this court

accords a good deal of deference to the judgment of the lower court and the administrative tribunal, both of which refused to disqualify Kennedy Holland. After a case has been adjudicated on the merits, we agree with authorities elsewhere who hold that a motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed absent evidence of abuse. See *Grahams Service Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982). An attorney disqualification matter is ancillary to the main case, whether the main case is at law, in equity, or is a special proceeding; thus, factual findings in disqualification cases will not be disturbed on appeal if substantial evidence supports those findings. *Killian v. Iowa Dist. Ct. for Linn Cty.*, 452 N.W.2d 426 (Iowa 1990).

Second, at this very late hour, whatever alleged damage was threatened by either Nelson's or Dugan's involvement most likely has been done. An appellate action is an inadequate means of presenting attorney conflicts of interest for review. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). By the time disqualification issues can be presented to an appellate court, any divulgence of confidences will already have occurred, and an appellate court cannot return the parties to the status quo ante. *Id.* Applicants contend that their circumstances merit a draconian remedy from this court – to disqualify counsel and order both the department and the state courts to brace themselves for the consequences of remand of this complex, time-consuming case – despite that applicants raise no objection to the department's findings on the merits of their application.

If the circumstances are in fact so exigent, and the potential for injustice is so great, that such an order is warranted, then applicants should have sought from this court a writ of mandamus ordering disqualification much earlier in the litigation. See *id.*

Baker v. Farnsworth, 117 Neb. 504, 221 N.W. 17 (1928), appears to require an automatic reversal of the decision of a trial court after an unsuccessful attempt at the trial level to disqualify counsel. However, that case is distinguishable. In *Farnsworth*, there were errors assigned, possibly meritorious, in addition to the claim of conflict of interest. In this case, no contention is made that the evidence does not support the decision of the department and the district court, and applicants conceded as much at oral argument.

In *Fitzsimmons v. State*, 116 Neb. 440, 218 N.W. 83 (1928), a criminal conviction was reversed where associates appeared for both the prosecution and the defense. We have noted that the standard for determination of whether error in a criminal case requires reversal is whether the error is harmless beyond a reasonable doubt. See *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995). Since the conflict could not be demonstrated to meet that standard, the conviction was properly reversed. Obviously, in the civil context of this case, where all parties concede the result is correct, the error may be said to be harmless.

We have held that mandamus is a viable means of addressing perceived attorney conflicts of interest. See, *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244

Neb. 36, 503 N.W.2d 838 (1993). Disqualification, upon a showing of conflict of interest, is a clear and absolute ministerial duty which a trial court has no discretion to disregard. See *Buckley, supra.* Given that applicants sat on their rights during the phase of litigation wherein mandamus may have been appropriate, however, this court will not impose that result from appellate review at the costs of greater delay, greater prejudice, and needless waste of judicial resources.

We hold that when an appeal from an order denying disqualification involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review. See *Maddocks v. Ricker; Casson,* 403 Mass. 592, 531 N.E.2d 583 (1988) (addressing guidelines for interlocutory appeals). In this case, any facts found even by virtue of breach of client confidences still will be facts and still will be available as evidence on remand. They will be no less facts merely because applicants' counsel might be more cagey on their second try. This court will not commit judicial resources to applicants' hope that relitigation against new opposing counsel yields improved results.

IV. SCOPE OF REMEDY

In its order denying applicants' Form A application, the department restricted applicants' ability to dispose of their stock in Chandler. Applicants must seek department approval before selling or transferring any of their Chandler stock to any other person. Discontent with this

restriction, applicants argue that in issuing this order, the director has exceeded the authority granted him by the Nebraska Revised Statutes and by the federal Constitution.

1. Statutory Authority

An administrative body such as the department has only that authority specifically conferred upon it by statute or by construction necessary to achieve the purpose of the relevant act. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). An agency must administer a statute in accordance with the standards prescribed in the statute and may not exceed those standards. *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). On review, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency. *In re Application A-16642, supra.* However, this court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). As no particular statute of the Act expressly provides for a restriction on sale of securities, our question is whether the Act provides for such a restriction by implication.

Because of the significant public interest in a well-regulated insurance industry, the Legislature has granted to the department general supervision, control, and regulation of insurance companies, associations, and societies and the business of insurance in Nebraska. See Neb.Rev.Stat. § 44-101.01 (Reissue 1993). The Legislature

further granted to the director of the department statutory power to perform all acts the department has the power and authority to do. See *id.* Notably, in two separate provisions, the Act specifically reserves implied powers not enumerated in the Act for the department and its director. See §§ 44-2139 (allowing the director to "issue such orders as necessary" to carry out the Act) and 44-2153 (providing that enumerated powers and remedies in the Act shall be in addition to and not in limitation of any other powers and remedies provided by law).

In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). The district court in this case found that the purpose of the Act is "to protect the policy holders by probing the competence of those seeking to control insurance companies." We agree with this finding. It is the department's responsibility, and not this court's, to manage and oversee the regulation of insurers and the protection of policyholders in Nebraska, and the department must have powers adequate to carry out that responsibility. See *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N.W. 449 (1941).

With respect to the "evils and mischiefs sought to be remedied," the Director of Insurance was presented with both a unique risk that NAICO policyholders could be subjected to needless prejudice by virtue of CenTra's acquisition and a unique opportunity to protect those

policyholders. Moroun's entities – including DuraRock Underwriters and its corporate predecessor, Can-Am Underwriters – have a history of difficulties in obtaining clean audits because of consistent undercapitalization, undercollateralization, and underreserving. Moroun's stock remedy for borderline insolvency seems to be liquidation of existing, underreserved entities and creation of new entities whose only "assets" are unsecured notes and debentures drawn from other Moroun entities. The values of those debentures tend to be generously and suspiciously magnified. Consequently, DuraRock Underwriters and its predecessor, Can-Am Underwriters, have come under – and failed to survive – scrutiny of insurance regulators in Barbados. James Adler, an expert accountant who testified for Chandler, stated that CenTra is "highly ill-liquid," that CenTra was experiencing severe cash-flow problems, and that Moroun uses his companies as his personal bank account. The director was thus legitimately concerned about how best to prevent such business practices from creeping into the operation of a Nebraska domestic insurer.

Beyond the problems experienced by and caused by Moroun entities in the past, however, the conduct of those entities in this litigation triggers legitimate concern that the only way for the department to protect NAICO policyholders is to retain jurisdiction over this matter and monitor applicants' disposition of their Chandler stock. No party may acquire statutory control of an insurer without department approval, and yet applicants boldly disregarded this very clear prohibition by amassing nearly five times that amount of stock specified for statutory control. That applicants broke the law is so clear that

applicants do not even raise an objection to that finding. Even when the director issued his first cease and desist order, applicants unhesitatingly circumvented the order by creating a sham corporation, pausing not even long enough to explain to the sham corporation's new directors what its purpose would be. The deposition testimony of Robert Berquist, a director of Can-Am Investments since its inception, is telling as to the motive for creating Can-Am: Berquist did not know what securities Can-Am would invest in; nor when or where Can-Am was incorporated; nor whether Can-Am had any assets or liabilities; nor, for that matter, whether Can-Am had any articles, bylaws, financial information, or minutes of meetings. This testimony cuts against applicants' denial that the creation of Can-Am was a sidestep of department orders.

Copious evidence supports the director's conclusion that the remedies expressly provided in the Act would not eliminate the policyholders' exposure to hazard and prejudice. Applicants' unapologetic disregard for Nebraska law raises the specter of future disregard for the interests of NAICO policyholders. Accordingly, we find that the director should not be impeded in his choices of remedy and protective measures by the enumerated powers of the Act. See *Workman v. Great Plains Ins. Co., Inc.*, 189 Neb. 22, 200 N.W.2d 8 (1972) (holding that public policy as to insurance may be expressed and enforced by department through exercise of its powers under statutes). The importance of the director's duties as a watchdog for policyholders, and the fact that the director is the only watchdog whose authority can bind applicants, counsel in favor of a broad construction of the Act

and the remedies provided therein. Pursuant to the grants of plenary authority contained in §§ 44-2139 and 44-2153, the director may issue the necessary protective orders until policyholders' interests are no longer jeopardized by outlaw corporate raiders.

2. Constitutional Authority

Having concluded that the director acted within his statutorily granted authority, we turn next to applicants' contention that the order violates the Commerce Clause of the federal Constitution. Applicants claim that either under an insurance-specific analysis of the Commerce Clause or under an all-purpose Commerce Clause analysis, the director has impermissibly burdened interstate commerce by restricting the activities not exempted from Commerce Clause scrutiny.

Whether a statute is unconstitutional is a question of law. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). Accordingly, this court is obligated to reach a conclusion independent of the decision reached by the trial court. *Id.* The unconstitutionality of a statute must be clearly demonstrated before this court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). Even when a law may be constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). As applicants attack an order issued pursuant to the Act, and as we have held that the order was issued within the

authority granted by the Act, we will examine the constitutional validity of the order as if it were a statutory part of the Act. See *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

(a) The McCarran-Ferguson Act

Article I, § 8, of the U.S. Constitution grants Congress the power to regulate commerce among the states. Contained within that grant of power to the federal government is an implicit limitation on the power of the states to interfere with or impose burdens on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). If Congress expressly authorizes the states to regulate an area of interstate commerce, however, any action taken by the state within that authorization will be invulnerable to Commerce Clause challenge. *Western & Southern L. I. Co. v. Bd. of Equalization*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981). Relevant to this case is the authorization Congress granted with respect to the states' regulation of insurance companies domiciled within their boundaries by enacting the McCarran-Ferguson Act (MFA). 15 U.S.C. § 1011 et seq. (1994). The MFA permits states to regulate insurance companies within their boundaries and removes all Commerce Clause limitations upon that authority. See *Western & Southern L. I. Co., supra.*

Even the auspices of the MFA, however, do not exempt all state regulation of the activities of insurers. *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969). Rather, the MFA grants states authority to regulate insurers only to the extent that state

law governs "the business of insurance." *Id.* See, also, 15 U.S.C. § 1012(a) and (b). Herein lies the critical inquiry: whether a restriction on the sale of stock in a domestic insurer is sufficiently connected to "the business of insurance" to be shielded by the MFA from Commerce Clause attack. Applicants argue that this restriction intrudes impermissibly into the federal realm of securities regulation.

The U.S. Supreme Court has reduced the inquiry of whether a practice is part of "the business of insurance" to a three-part test: (1) The practice must relate to the transferring and spreading of risk, (2) the practice must be an integral part of the policy relationship between the insurer and the insured, and (3) the practice must be limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). As applied to the Act and orders issued pursuant to the Act, these criteria support our finding that the director's order does relate to "the business of insurance."

First, the restriction on stock disposition relates, albeit indirectly, to the transferring and spreading of risk. The Act and its implied powers are triggered only when a person who makes a tender offer for voting securities of a domestic insurer would acquire control of that domestic insurer. See § 44-2126. The Act affords the Director of Insurance a chance to review the financial stability of the acquiring company so that he can determine whether acquisition is in the best interests of Nebraska policyholders. See *id.* See, also, *Hoylake Investments Ltd. v. Gallinger,* 722 F. Supp. 573 (D. Ariz. 1989). The director is further afforded, by virtue of §§ 44-2139 and 44-2153, the

opportunity to bring any threatened change of control under his own control so that he can consider the impact of such a change on policyholders. See *Gallinger, supra.*

Whether a domestic insurer will remain reliable to its policyholders certainly relates to the transferring and spreading of risk. In this case, the director is justifiably concerned that the stock will be transferred to more Moroun entities, legitimate or otherwise, thereby prejudicing the interests of policyholders. Notably, in states with laws similar or identical to those composing the Act, courts have found that such laws do relate to the transferring and spreading of risk. See, *Gallinger, supra* (Arizona law); *Hoylake Investments Ltd. v. Bell*, 723 F. Supp. 576 (D. Kan. 1989) (Kansas law); *Hoylake Investments Ltd. v. Washburn*, 723 F. Supp. 42 (N.D. Ill. 1989) (Illinois law). Those courts reasoned that because a change of control of an insurer can affect the quality and stability of policies, these laws satisfy the requirement that they related to the transferring and spreading of risk. The same is true for the Nebraska Act and for orders issued pursuant to the Act.

The second criterion of "the business of insurance" is that the regulated practice must be an integral part of the policy relationship between the insurer and its insured. *Pireno, supra.* The Nebraska Act satisfies this criterion as well. The review and evaluation by the director involves the relationship between an insurance company and its policyholders. Cf. *Alleghany Corp. v. Pomeroy*, 700 F. Supp. 460 (D.N.D. 1988), *rev'd on other grounds* 898 F.2d 1314 (8th Cir. 1990) (stating that policyholder is concerned only with whether claim will be paid, not with who controls direction of company). Unfortunately, the individual

policyholder is not in a position to understand the ramifications of a change of control in his insurer until the insurer becomes insolvent and unable to pay claims. The director has both the ability and the statutory responsibility to ensure that the relationship between the insurer and the policyholder is one of mutual understanding and not one of deceit. See, *Bell, supra; Washburn, supra.*

The third criterion of "the business of insurance" requires that the regulation be limited to entities within the insurance industry. This criterion is also satisfied. It is true that the Act affects not only policyholders, but also investors and stockholders who seek to own stock in Nebraska domestic insurers. See *Alleghany Corp., supra.* We further recognize that the Act restricts the ability of an out-of-state stockholder to sell his interest to a willing purchaser whenever the sale would result in the purchaser's owning more than 10 percent of the domestic insurer. See *id.* The focus of all of these restrictions, however, remains the interest of the individual policyholder.

Irrespective of what sort of concern pursues ownership and control, the Act concerns itself solely with the acquisition of domestic insurance companies. See *Washburn, supra.* This is not an instance of the department reaching out to invade the stock market. Rather, it was applicants who wished to control the handling of Cen-Tra's insurance claims; it was applicants who sought to gain control of their insurer by owning its stock; and it was applicants who chose to cast into jeopardy the one policy concern for whose protection the department was created: that an insurer should remain as reliable as it promises its insureds it will be. The director has not

intruded into securities regulation. If anything, it is applicants who have intruded impermissibly into insurance regulation. The Act affects entities outside the insurance industry only insofar as those entities choose to enter this rightly regulated arena.

Applicants assert that *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969), supports their contention that the director's order transgresses the regulation of "the business of insurance." In *National Securities, Inc.*, the U.S. Supreme Court invalidated a portion of the Arizona version of the Act, a body of law substantially similar to the Nebraska Act. The portion in question required the director to find that a merger of insurers would not substantially reduce the services to be rendered to policyholders. The Court concluded that regulation whose focus is the protection of stockholders does not sufficiently relate to the MFA to be shielded from Commerce Clause attack.

In contrast to the facts of *National Securities, Inc.*, the provisions questioned in this case protect not stockholders, but policyholders. No part of the Nebraska Act is concerned with security of or services rendered to stockholders; whether merger or acquisition is equitable to stockholders is immaterial in the eyes of the director. Significantly, however, the *National Securities, Inc.*, Court found that the section of the Arizona act that empowered the director to determine whether acquisition would substantially reduce the security of *policyholders'* interests "clearly relates to the 'business of insurance.' " 393 U.S. at 462. This holding of *National Securities, Inc.*, and not the holding pertaining to stockholders, controls our disposition of the Act's conformity with the MFA.

Policyholders' interests can come under attack from many fronts, including manipulation of ownership and control by individuals to whom an insurer's solvency is a negligible priority. In his concurrence to *S. E. C. v. Variable Annuity Co.*, 359 U.S. 65, 90-91, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959), Justice Brennan wrote that "[t]he prevention of insolvency and the maintenance of 'sound' financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation [of insurance] is aimed at." We agree, and accordingly we hold that the Nebraska Act and the director's order relate to "the business of insurance" and thereby qualify for the protection of the MFA against a Commerce Clause challenge.

(b) Commerce Clause Analysis Under *Pike v. Bruce Church, Inc.*

Finally, applicants argue that even if the MFA applies, the director's order violates the Commerce Clause under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The general rule arising from *Pike* states that

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted.] If a legitimate local purpose is found, then . . . the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be

> promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation omitted] but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

397 U.S. at 142. See, also, *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995) (applying *Pike* balancing test).

The U.S. Supreme Court applied its *Pike* analysis in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982), finding that the Illinois Business Take-Over Act directly regulated transactions that take place wholly outside the State of Illinois. Because the statute prevented offerors from conducting interstate transactions with stockholders both within the State of Illinois and in foreign states bearing no relation to Illinois, the Court found that statute to be a direct restraint on interstate commerce with an impermissibly sweeping extraterritorial effect. Significantly, however, neither the Nebraska Act nor the director's order has by its terms such extraterritorial reach. The mere fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978).

We find stronger authority for analysis of the Nebraska Act in the case *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). In *CTS Corp.*, the U.S. Supreme Court upheld an

Indiana takeover statute against a Commerce Clause challenge. The Indiana statute protected shareholders of Indiana corporations by placing certain obstacles in the path of any party making a hostile tender offer for those shares. The respondent alleged unconstitutional interference with interstate commerce. In rejecting this Commerce Clause attack, the *CTS Corp.* Court stated that the act did not prohibit any entity of any state from attempting to gain control of an Indiana corporation: "It only provides regulatory procedures designed for the better protection of the corporations' shareholders." 481 U.S. at 93.

The Nebraska Act does not have the reach of the invalidated statute of *MITE Corp.* The Act applies equally, regardless of whether the would-be acquiring party is a Nebraska resident. As such, the Act does not resemble the " 'principal objects of dormant Commerce Clause scrutiny,' " which are statutes that discriminate against interstate commerce. See *Hoylake Investments Ltd. v. Washburn*, 723 F. Supp. 42, 47 (N.D. Ill. 1989). The Act, further, poses no threat of inconsistent regulations, since it regulates only the internal affairs of insurers registered in Nebraska. See *id.* The local purpose of protecting Nebraska policyholders is legitimate and qualifies as a valid use of police power. See *State ex rel. Neff v. Christian Brotherhood of America Burial Assn.*, 186 Neb. 525, 184 N.W.2d 643 (1971). Moreover, the order is not an outright prohibition of stock sales by applicants, but only a prior-approval requirement: the order impedes applicants from nothing except skating around department authority. The scales thus tip in favor of the legitimate local purpose

when balanced against the incidental effects on commerce.

In issuing the prior-notice restriction, the director of the department did not exceed the authority granted him under the Act. The director, furthermore, acted within the confines of the Commerce Clause, applying either the MFA analysis or the *Pike* balancing test. Applicants' second assignment of error fails.

V. CONCLUSION

Because applicants' request to disqualify counsel is irredeemably late, and because the director acted within the scope of his statutory and constitutional authority, we affirm the holdings of the Lancaster County District Court.

AFFIRMED.

WRIGHT, J., not participating.

APPENDIX 2

BEFORE THE DEPARTMENT OF INSURANCE
STATE OF NEBRASKA

IN THE MATTER OF THE ACQUISITION OF NATIONAL AMERICAN INSURANCE COMPANY	))))))	ORDER CAUSE NO. C-755 (Filed Oct. 28, 1992)

An application seeking approval of a change in control of a domestic insurance company came on for hearing before the Department of Insurance of the State of Nebraska on September 24, 25, 28, 29 and 30, 1992, pursuant to the Insurance Holding Company System Act, *Neb.Rev.Stat.* §§ 44-2120 *et seq.* Robert G. Lange, Deputy Director of the Nebraska Department of Insurance was the duly appointed hearing officer. The parties, to be named hereafter, appeared at the hearing through their respective legal counsels. The Department of Insurance appeared through its staff. The hearing was preceded by a number of pre-hearing conferences and motion hearings which form part of the record of this matter. The hearing was conducted in accordance with the rules of evidence for the District Courts of the State of Nebraska and was recorded by a court reporter. Each party presented and cross-examined witnesses and offered documentary evidence. The Department of Insurance staff made inquiry of each witness. The Hearing Officer took the matter under advisement and after due consideration makes the following Findings of Fact, Conclusions of Law and Order.

STATEMENT OF ISSUE

The issue in this proceeding is whether any of the disqualifying conditions set forth in *Neb.Rev.Stat.* § 44-2127(1) exists with regard to the application to acquire control of National American Insurance Company ("NAICO"), a Nebraska domestic property and casualty insurance company. Since no evidence was offered on *Neb.Rev.Stat.* § 44-2127(1)(a) or § 44-2127(1)(b), the hearing officer makes no findings on these issues and limits findings to § 44-2127(1)(c) on the financial condition of the Applicants, § 44-2127(1)(d) concerning the plans of Applicants for the insurer, § 44-2127(1)(e) Applicants' competence, experience and integrity, and finally § 44-2127(1)(f), concerning whether approval would be hazardous or prejudicial to the policyholders or public.

FINDINGS OF FACT

A. National American Insurance Company and Chandler Insurance Company, Ltd.

National American Insurance Company ("NAICO") is a Nebraska corporation and is a domestic insurer as defined in *Neb.Rev.Stat.* § 44-103. NAICO writes property and casualty insurance and holds a certificate of authority to do the business of insurance in Nebraska and forty-three other states. As a Nebraska domestic insurer, NAICO is subject to the Insurance Holding Company System Act set forth in *Neb.Rev.Stat.* §§ 44-2120 *et seq.*, including the requirement that a change in control of NAICO is subject to the prior approval of the Director of Insurance, as provided for in § 44-2126 and § 44-2127. NAICO is a wholly owned subsidiary of Chandler

(U.S.A.), Inc. ("USA"), an Oklahoma corporation, which in turn is a wholly owned subsidiary of Chandler Insurance (Barbados) Ltd. ("Chandler Barbados"), a Barbados corporation, which in turn is a wholly owned subsidiary of Chandler Insurance Company, Ltd. ("Chandler Insurance") a Cayman Island corporation. Accordingly, all of these corporations are considered domestic insurers within the meaning of *Neb.Rev.Stat.* § 44-2126(2). Control of Chandler Insurance, the Cayman Island corporation whose publicly traded stock is at issue in this matter, determines control of its subsidiary, NAICO, the Nebraska insurance company. Unless otherwise indicated, all of the above entities and their officers, directors and employees are collectively referred to as Chandler Insurance.

B. Applicants

The applicants in this proceeding are CenTra, Inc. ("CenTra"), Can-Am Investments, Ltd. ("Can-Am Investments"), Ammex, Inc. ("Ammex"), DuraRock Underwriters, Ltd. ("DuraRock") and Manuel J. Moroun ("Moroun").

CenTra is a Delaware corporation with its principal place of business in Warren, Michigan. CenTra is a holding company which directly or indirectly owns at least 80% of the voting securities of a group of additional corporations engaged in motor freight transportation and other businesses. Moroun owns 49.88% of CenTra's common stock. The remainder of CenTra's common stock is owned by Moroun's father, T. J. Moroun and Moroun's three sisters. The principal officers of CenTra are Moroun

(President), Ronald Lech (Executive Vice-President and Assistant Secretary), and Norman Harned (Vice-President and Treasurer). At the time of this hearing, CenTra, Ammex and Moroun collectively held 22.7% of the stock of Chandler Insurance. Moroun controls CenTra.

Can-Am Investments is a Bahamian corporation formed in July, 1992, for the sole purpose of acquiring the stock of Chandler Insurance. The directors of Can-Am are Norman Harned, Ronald Lech and R. E. Berquist, Sr. Can-Am Investments purchased 26.5% of the stock of Chandler Insurance.

Ammex is a Michigan corporation which owns and operates two duty-free stores in Detroit, Michigan. Moroun owns 100% of the voting securities of Ammex.

DuraRock is a reinsurance company and a corporation registered under the Barbados Exempt Insurance Act of 1983. All voting securities of DuraRock are owned by the Manuel J. Moroun Irrevocable Trust for Matthew T. Moroun, Moroun's son, under agreement dated July 31, 1989.

Moroun is an individual whose principal place of business is Warren, Michigan. In addition to being the president of CenTra, Moroun is the Chairman and Chief Executive Officer of the Detroit International Bridge Company ("Bridge") which owns and operates a toll bridge between Detroit, Michigan and Windsor, Ontario. Moroun is also the Chairman and Chief Executive Officer of Ammex and owns the percentage of voting securities indicated in the following corporations: CenTra (49.88%); Liberty Bell Agency, Inc. (51.34%); U.S. Truck Company, Inc. (51.34%); Lakeshore Properties of Michigan, Inc.

(100%); E-Quip Lease Corporation (51.34%); and Ammex (100%). CenTra, Can-Am, Ammex, DuraRock and Moroun are collectively referred to as ("Applicants"). Moroun controls all of the Applicants listed on the application and is the ultimate controlling person for purposes of this application. Moroun did not appear at the hearing.

C. Background and Events Leading up to the Filing of this Application.

1. In January, 1987, NAICO was acquired by various investors including NAICO's current principal management, Brent LaGere, and Benjamin T. Walkingstick. NAICO is currently indirectly owned and controlled by Chandler Insurance, which is owned by a number of shareholders, none of which hold more than 10% of the outstanding capital stock of Chandler Insurance, with the exception of CenTra and Can-Am Investments.

2. In 1987, CenTra entered into an insuring agreement (commonly called a fronting program) with NAICO, whereby NAICO issued a number of workers' compensation, automobile and general liability insurance policies, covering CenTra and its affiliates. These policies were then reinsured through Can-Am Underwriters and its successor, DuraRock Underwriters. CenTra also obtained an ownership interest in NAICO by acquiring stock in NAICO's parent corporation. In 1989, CenTra filed an application with the Department under the Insurance Holding Company System Act disclaiming control of NAICO, notwithstanding the fact that such interest exceeded the 10% statutory presumption of control. The

Director approved the control disclaimer based in part upon the "Standstill Agreement" of the parties.

3. In late 1991, the management of Chandler Insurance and NAICO began to consider the idea of converting Chandler Insurance, the ultimate controller of NAICO, to a privately held corporation from that of a publicly held corporation. During the first half of 1992, the Applicants and the management of Chandler Insurance discussed taking Chandler Insurance private and negotiated over the ownership interest the Applicants would receive as a result of taking Chandler Insurance private. The source of funds to acquire Chandler Insurance shares was to have been existing funds within Chandler Barbados and additional funding from outside sources as necessary.

Ultimately, the Applicants and the management of Chandler Insurance were unable to reach an agreement on taking Chandler Insurance private. Later, management independently proceeded with a public tender offer on July 9, 1992, but subsequently withdrew its tender offer on July 22, 1992. In the meantime, through a series of transactions occurring between approximately July 1 and July 16, 1992, the Applicants acquired additional shares of Chandler Insurance, bringing their total holdings to 49.2% of the issued and outstanding stock of Chandler Insurance. As a result, Applicants have filed this application with the Director under the Insurance Holding Company System Act seeking approval to acquire control of NAICO, the subject of this hearing.

D. Consideration of Grounds to Disqualify as Set Forth in Neb.Rev.Stat. § 44-2127(1).

1. Financial Condition of Applicant, § 44-2127(1)(c).

(a) CenTra and Can-Am Investments are now the primary shareholders of Chandler Insurance, and therefore the financial condition of these two entities is of particular importance. Applicant provided CenTra's audited financial statements for the last five years ending December 31, 1991. For the year ending December 31, 1991, CenTra's net worth was $127,675,802. Testimony at the hearing indicated that CenTra's philosophy is to hold investments long-term and not to sell its holdings. The testimony indicated that CenTra is a well-established company which has been engaged in the motor transport business for more than 40 years and has grown substantially over time. CenTra's auditor, Robert Rock, a Certified Public Accountant of Price Waterhouse, testified that CenTra takes a conservative approach to accounting issues.

However, other testimony and evidence indicates that CenTra is experiencing cash flow difficulties. Mr. Harned, CenTra's Vice-President and Chief Financial Officer, indicated that CenTra was behind on its insurance premium payments which was caused by CenTra's not receiving payment from its customers on a timely basis resulting in CenTra not being able to timely settle with all suppliers and vendors. This forced CenTra to first pay those that "can't wait for their money" and to adopt money management policies of Ford and Chrysler, who pay when they feel like it. In addition, in his deposition, Mr. Richard Evans, an officer of NAICO indicated that

NAICO has been having problems with the timeliness of workers' compensation payments by CenTra. Further, and probably most telling, Mr. James Adler, Ph.D., CPA, an expert in accounting and economics, testified extensively about CenTra's cash flow problems and stated that CenTra's working capital is tied up in non-liquid items to a great extent. Mr. Adler concluded that CenTra is desperately in need of cash. Another indication of CenTra's cash flow problems is evidenced by an internal memorandum from a Ms. Rohn to Ms. Jill Clair of its affiliate, Liberty Bell, dated May 23, 1991. That memo indicated funds were not available at that time to pay CenTra's premiums to NAICO.

Mr. Adler also testified extensively regarding CenTra's working capital. He testified that working capital is the life blood of an operating company and that CenTra's working capital as shown in its financial statement as of December 31, 1991, is greatly overstated and misleading. More specifically, Mr. Adler testified that CenTra's extensive holdings of stock in Chandler Insurance and a Michigan bank should not have been shown as current assets nor should the investments in Lakeshore Properties or extensive receivables from P.A.M. Transportation Services have been shown as current assets. The Manuel J. Moroun Trust for Matthew Moroun controls P.A.M. According to Mr. Adler, showing these investments as current assets in CenTra's financial statements is not consistent with the Applicant's representation that these investments are being held for the long-term and therefore, the working capital and financial condition of CenTra is overstated and misleading. These adjustments reduced CenTra's working capital to almost nothing. Mr. Adler further

testified that CenTra has breached its loan covenants, that CenTra's financial condition is deteriorating based upon its performance over the last two years in particular, that CenTra is not financially healthy and that CenTra is desperately in need of cash.

(b) Can-Am Investments has paid in capital of $2,000 and its sole asset is the Chandler Insurance stock it holds. The financial condition of Can-Am Investments is also relevant to this application because it has recently acquired Chandler Insurance stock. Can-Am is indebted to Moroun in the approximate amount of $10 million, the amount loaned to it by Moroun. Can-Am Investments apparently intends to convert this indebtedness to preferred stock to be issued to Moroun. Can-Am's financial condition and its ability to either repay the debt to Moroun or to pay dividends to Moroun based upon stock ownership, is highly suspect since Can-Am's only source of income is its investment in Chandler Insurance whose ability to pay dividends is subject to restrictions imposed by insurance regulation.

(c) Considerable testimony and evidence was also presented regarding the financial condition of DuraRock and its predecessor Can-Am Underwriters. Although DuraRock is not owned by CenTra or Can-Am, it is in fact owned by the Manuel J. Moroun Trust. DuraRock's financial condition is significant because it is the reinsurer of NAICO under the CenTra-NAICO fronting program and thus impacts the overall financial condition of the CenTra group of companies. First, testimony and evidence presented during the hearing indicates that the financial condition of Can-Am Underwriters, a reinsurer and the predecessor of DuraRock, was misstated and that inflated

assets have been used to capitalize DuraRock. Moroun's deposition and Mr. Lech's testimony indicate that the $3.68 million debenture (which was originally issued by Can-Am Underwriters to Moroun in exchange for his stock in Can-Am) was only worth $10,000. This indicates that Applicants believe that Can-Am Underwriters was not in as good a condition as was purported at the time it was liquidated into DuraRock. In effect, Can-Am paid too much for the Moroun shares and Can-Am Underwriters was probably insolvent at the time it was liquidated into DuraRock. The debenture was subsequently contributed to DuraRock in exchange for stock, and, as a result, DuraRock was in effect paid only a nominal amount for capital stock which it issued and carries on its books at $3.68 million.

In addition, a Price Waterhouse audit of DuraRock revealed a "short fall" in DuraRock due to under reserving. At the hearing, Mr. Harned testified that this was a mistake on the part of Price-Waterhouse, but Applicants have failed to provide an adequate explanation of why Price-Waterhouse originally concluded that there was a short fall, why that conclusion was a mistake, and what the true financial status of DuraRock is.

The record further reflects that DuraRock was probably insolvent until such time as a debenture in the amount of $3.68 million was converted to share capital and a $3 million promissory note was replaced with audit premiums receivable. Mr. Adler testified the Price Waterhouse papers revealed a similar "retrospective premium" for 1991 billed to Centra for $6.2 million at some time in 1992. This premium, however, was never explained by Applicants.

Mr. Michael Toothman, an actuary, testified regarding the reasonableness of DuraRock's reserves. However, Mr. Toothman's review and analysis was limited to the methods and procedures applied by Mr. Gutterman, the Price Waterhouse actuary who conducted the actuarial analysis of DuraRock's reserves. Inexplicably, Mr. Gutterman did not testify. Accordingly, the record is not benefitted by the most comprehensive and thorough actuarial analysis of DuraRock and therefore DuraRock's financial condition remains subject to question.

(d) Testimony and evidence indicates that Moroun utilizes the assets of various CenTra affiliates for his own personal benefit and purposes and that loans and advances are commonplace among various affiliates to shore each other up when needed. Mr. Harned's testimony indicates that the unsecured advance in the amount of $7.75 million which Moroun received from Bridge to invest in Can-Am Investments must be repaid before the end of the year. Mr. Adler testified extensively in particular on three transactions involving Moroun and CenTra or its affiliates: the Lakeshore Properties land contract whereby $21 million dollars was furnished to Lakeshore by CenTra, the P.A.M. Transportation Services series of transactions where CenTra invested $3 million in P.A.M. Transportation Services, advanced $4 million to P.A.M. Transportation Services, promised to advance an additional $4 to $6 million to P.A.M. and the advance of money by Bridge to Moroun so that Moroun could in turn loan $8 million to Can-Am Investments to purchase Chandler stock. Mr. Adler testified that in effect, CenTra was being operated as Moroun's own personal bank

account in these three transactions. Furthermore, deposition testimony by Mr. Paul Maestri, a director of Chandler Insurance and former stockholder of P.A.M., also indicates that Moroun utilizes the assets of various CenTra companies for his own personal use. There is no reason to believe that he would not use the assets of the Chandler Insurance Group in the same way.

As a result of the cash flow problems of the CenTra Group, it appears that Moroun will have to either liquidate some of his personal assets or obtain loans or advances from Chandler Insurance operations in order to repay the advance made to him by Bridge.

2. Competence, Experience and Integrity of Applicant, § 44-2127(1)(e).

(a) The record indicates Applicants have taken great effort and expense to elude regulatory oversight of offshore insurance regulators. The record indicates Can-Am Underwriters was substantially under reserved as of June 30, 1990 and likely was insolvent. An internal memo of a CenTra employee, Mr. Beryl Shroyer, addressed Can-Am Underwriter's inability to get a "clean" opinion by Price Waterhouse for the period ending June 30, 1990, and further suggested letting Can-Am Underwriters go "unaudited" for the period. Shortly thereafter, Can-Am Underwriters was liquidated and its assets transferred to DuraRock. Mr. Lech testified the purpose of liquidating Can-Am in the Bahamas and setting up DuraRock in Barbados was to have access to relaxed premium to surplus ratios allowed in Barbados. Nevertheless, the voluntary liquidation of Can-Am Underwriters prevented any

further scrutiny whatsoever of its financial condition by the Bahamian Insurance Superintendent to assess whether it was insolvent at the time of liquidation.

The Barbados Supervisor of Insurance made repeated requests for audited financial statements on Can-Am Underwriters for the period ending June 30, 1990, and DuraRock for the period ending June 30, 1991. However, the financial condition of Can-Am Underwriters was never separately audited before it was liquidated thereby avoiding the solvency issue. Although financial statements for DuraRock for the period ending June 30, 1991, were finally provided to the Barbados Supervisor of Insurance on April 30, 1992, the record reveals that Barbados would not have allowed the transfer of Can-Am Underwriters into DuraRock had the Barbados Supervisor of Insurance known that Can-Am Underwriters was insolvent.

An audited financial statement was eventually issued combining the liabilities of Can-Am Underwriters with the newly formed reinsurer, DuraRock, for the period ending June 30, 1992, which showed that reserves for the combined operations were adequate. However, not until the filing of the application to acquire NAICO were the combined financial statements of Can-Am Underwriters and DuraRock produced for any regulatory review.

Besides delaying production of financial statements, the Applicants also engaged in conduct involving DuraRock and the Barbados Supervisor of Insurance which, like the Can-Am Underwriters liquidation, avoided facing the solvency concerns of the Barbados Supervisor without materially changing and improving

the financial condition of DuraRock. Applicants engaged in a pattern of superficial transactions to materially affect the accounting entries of DuraRock in order to meet solvency requirements. Specifically, the record indicates that a shortfall in DuraRock's reserves existed in the amount of $13 million on or around March 6, 1992, which Mr. Harned could not explain.

Subsequently, the Supervisor advised DuraRock that a capital infusion was necessary in order to meet minimum solvency requirements. A debenture was issued by Can-Am Underwriters to Manuel J. Moroun Trust in exchange for his interest in the purported net worth of Can-Am Underwriters. The debenture was then transferred to Mr. Lech for $10,000, who in turn, transferred it to M.J. Moroun Trust for Matthew T. Moroun for $15,000, which transferred it back to DuraRock. When the Barbados Supervisor of Insurance refused to allow the treatment of the debenture as contributed surplus for solvency purposes, it was converted to share-capital at the $3.68 million figure. Mr. Lech testified the purpose of the numerous transactions was to lessen the value of the debenture and ultimately, the gift tax paid by Moroun on contributions to the trust established for Moroun's son. Mr. Lech testified that the value as far as DuraRock was concerned was still $3.68 million. However, Mr. Lech admitted the debenture was appraised at a value of $15,000 during the course of the above transactions.

The accounting entries of DuraRock were also manipulated when the Barbados Supervisor of Insurance rejected an unsecured note of $3 million from Moroun's sister as a contribution to the surplus of DuraRock until a letter of credit was provided securing the obligation. The

Barbados resident manager, Mr. Steven Butler, testified that $3 million was needed to meet Barbados solvency requirements and to continue doing business in Barbados. The record indicates the shortfall was corrected by a $3 million premium thereafter billed to Centra [sic]. According to LaGere, this was actualiy an audit premium that was requested by Mr. Harned to obviate DuraRock's need for a letter of credit to back up the promissory note.

(b) The record also indicates that Applicants, in their dealings with the Nebraska Insurance Department, have failed to exhibit the degree of public trust necessary to control an insurance company. Applicants were well aware of the Department's position through its general counsel, Jeanette Smith, that a Form A application must be filed with the Nebraska Insurance Department before attempts to acquire or increase control of a domestic insurance company are pursued. The Applicants nevertheless proceeded with attempts to acquire stock privately before filing a Form A application.

Thereafter, the Applicants proceeded to make tender offers to purchase stock on the open market. Applicants continued such activity after the Department ordered them to cease such purchases. Mr. Lech testified that he considered that the Department's interpretation that the Cease and Desist Orders did not allow for conditional purchases to merely be "advice." Applicants subsequently placed the stock in a trust whereby beneficial ownership of the stock would be transferred to the newly organized corporation, Can-Am Investments. Voting of the shares was conditioned upon regulatory approval of the Form A application.

Mr. Richard Stewart, an expert in insurance regulatory matters, testified that a trust arrangement is a device used pending regulatory approval of insurer acquisitions; however, he knew of no such device used contrary to an order of an insurance director and conceded that violation of a cease and desist order might reflect on an applicant's integrity.

While the shares remained in trust at the time of the hearing, it is apparent from the deposition of Mr. Matthew D. Mason, III, a Dean Witter Trust employee, and the document itself, that the trust in this case is merely an escrow trust arrangement subject to revocation by Moroun at any time. It has not effected an independent parking place for the stock pending approval.

That Applicants seriously contend that Can-Am Investments is not affiliated with Moroun and that they intend to hold NAICO for the long-term, also raises serious concern respecting Applicants' veracity in matters before the Director. The depositions of various directors of Can-Am Investments clearly indicate that Moroun exercised considerable control over the establishment of Can-Am Investments by setting up straw directors. Those directors consistently testified of Moroun's presence at the first meeting and his lecture on the purpose of their acquisition of control of Chandler Insurance Company. Moreover, all of these stockholders are either relatives of Moroun or employees of companies controlled by Moroun. It is apparent from the deposition testimony of these stockholders, Moroun's $10 million loan, and the circumstances surrounding the establishment of Can-Am Investments that Can-Am Investments is controlled by Moroun.

Applicants presented conflicting evidence on their plans for Chandler Insurance. The record reveals the motivation for CenTra to obtain an interest in NAICO was to accomplish control or influence over an insurance company in order to secure a stable source of insurance coverage for CenTra and its affiliates and to continue a fronting program which would allow for control over reserves and claim payments relative to insurance coverage for CenTra and its affiliates. As was the case with other commercial enterprises during this time period, CenTra found it difficult to secure a stable source of liability insurance coverage in the marketplace over the years. A memo dated June 12, 1987, from Mr. Lacca, the President of CenTra affiliate Liberty Bell, to Mr. Harned, (Ex. 1136), Mr. Lacca stated:

(a) "From an insurance point of view, the cost savings are a minor point in the decision to invest in N.A.I.C.O."

(b) "Self-insurance is not the solution."

(c) "The only way to get out of this problem is to have a controlled or at least influenced fronting company."

(d) "Without a locked in fronting company, we are back to taking whatever the insurance industry wants to throw out, if anything."

It was on that basis that Moroun, the ultimate controller of CenTra, invested in NAICO. Mr. Lacca's memo of 1987 and deposition testimony indicate the beginning of a pre-conceived plan to acquire control of an insurance company for the purpose of stabilizing CenTra's insurance market. Deposition testimony by Moroun also supports this plan. However, Mr. Lech and Mr. Harned each

testified that the investment in the Chandler Insurance in 1992 was prompted solely by the Chandler "going private" action. Mr. Lech also testified that CenTra's investments in Chandler Insurance was for the "long-term." Contrary to this testimony, however, CenTra's financial statements reflect its investment in Chandler Insurance as a current asset and not as a long-term asset. These inconsistencies cast serious doubt on the Applicants' actual plans for NAICO and at best renders the stated plans for the insurer suspect.

Can-Am Investments was established after the date of the purchases of the stock and after the Director issued the first of two Cease and Desist Orders. Because the intended formation of Can-Am Investments was not mentioned in the Form A as originally filed, Can-Am could not have been named as a party to whom the original Cease and Desist Order was addressed, providing a convenient mechanism to circumvent the Director's Orders. Purchases ceased pursuant to the second order by the Director but this was after substantial stock purchases occurred.

The foregoing raises serious doubt to Applicants' true intentions for NAICO and reflect a proclivity to manipulate circumstances irrespective of the Department's regulatory orders. It is clear such continued maneuvering by Applicants to circumvent regulatory oversight is not in the best interest of the policyholders.

CONCLUSIONS OF LAW

1. The Department of Insurance of the State of Nebraska has jurisdiction over the application to acquire

control of National American Insurance Company, a Nebraska insurance company, and over the Applicants, under the provisions of the Insurance Holding Company System Act, *Neb.Rev.Stat.* §§ 44-2120 to 44-2153.

2. Both the Nebraska Legislature and the Nebraska Supreme Court have recognized that the business of insurance is public in character:

> Within the intent of this Chapter, the business of appropriation and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such services, is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto, shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all manners pertaining to such businesses. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in this business.

Neb.Rev.Stat. § 44-101. See also *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 863 (1915).

The essence of insurance is a promise to pay upon the happening of some future event. The insurer and its managers have a fiduciary responsibility to their insureds. The insurer's promise is based upon the financial soundness of the insurer and the integrity of its managers and owners. Consequently, who is allowed to own, control and manage an insurance company is the proper subject of insurance regulation and is vitally important to the insurer's policyholders and the public.

3. The hearing on this matter lasted five full days. The testimony of at least 17 witnesses was heard and the testimony of at least 31 additional witnesses was received by deposition. Voluminous documentary evidence was received into the record. After careful and thorough consideration of the hearing record, the application is disapproved pursuant to *Neb.Rev.Stat.* § 44-2127(1)(c), (e) and (f) for the following reasons:

(1) The financial condition of the acquiring party is such as might jeopardize the financial stability of NAICO or prejudice the interest of policyholders of the insurer;

(2) The competence, experience, and integrity of the acquiring parties who would control the operation of NAICO are such that it would not be in the interest of policyholders or NAICO or the public to permit the acquisition; and

(3) The acquisition is likely to be hazardous or prejudicial to the public.

ORDER

IT IS THEREFORE ORDERED that the application CenTra, Inc., Can-Am Investments, Ltd., Ammex, Inc., DuraRock Underwriters, Ltd. and Manuel J. Moroun to acquire control of National American Insurance Company is denied.

IT IS FURTHER ORDERED that the Department shall retain jurisdiction of this matter for the purpose of enabling Applicants, the management of Chandler Insurance, or the Department to make application for such

further orders as may be necessary regarding the disposition of Applicants' Chandler stock, whether held directly, indirectly, beneficially or otherwise.

IT IS FURTHER ORDERED that the Department's order of September 16, 1992, prohibiting certain named parties and entities and their affiliates from selling, transferring, conveying, assigning, or in any manner disposing of their ownership of any and all stock acquired after December 31, 1991, without the prior approval of the Director of Insurance is hereby extended until such time as a hearing on disposition of stock can be held.

Dated this 28th day of October, 1992.

/s/ Robert G. Lange
ROBERT G. LANGE
Hearing Officer

CERTIFICATE OF ADOPTION

I, William H. McCartney, Director of the Nebraska Department of Insurance, hereby adopt the foregoing Findings of Fact, Conclusions of Law and Order as my official Order in this proceeding.

Dated this 28th day of October, 1992.

/s/ William H. McCartney
WILLIAM H. MCCARTNEY
Director of Insurance
State of Nebraska

APPENDIX 3

EXHIBIT B

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

CENTRA, INC., a Delaware Corporation; CAN-AM INVESTMENTS, LTD., a Bahamian Corporation; AMMEX, INC., a Michigan Corporation; DURAROCK UNDERWRITERS, LTD., a Barbados registered Corporation; and MANUEL J. MOROUN, an individual, Plaintiffs vs. CHANDLER INSURANCE COMPANY, LTD., a Cayman Island Corporation; CHANDLER INSURANCE (BARBADOS) LTD., a Barbados Corporation; CHANDLER (U.S.A.), INC., An Oklahoma Corporation; NATIONAL AMERICAN INSURANCE COMPANY, A Nebraska Corporation; and NEBRASKA DEPARTMENT OF INSURANCE, an agency of the State of Nebraska, Defendants.	Doc.489 Page 261 Doc.491 Page 258 ORDER

These two actions constitute consolidated appeals by the plaintiffs from orders issued by the Director of the Department of Insurance. The plaintiffs have appealed

pursuant to the Nebraska Administrative Procedure Act. Neb. Rev. Stat. §§ 84-901 to 84-920 (Cum. Supp. 1992). The issues involve provisions of the Nebraska Insurance Holding Company System Act, Neb. Rev. Stat. §§ 44-2122 to 44-2153 (Cum. Supp. 1992).

National American Insurance Company ("NAICO") is a Nebraska Corporation and is a domestic insurer subject to the Insurance Holding Company System Act ("the Act"). Neb. Rev. Stat. § 44-103. The relevant provision in the Act is the requirement that a change in control of NAICO must have prior approval of the Director of Insurance. Neb. Rev. Stat. § 44-2126 and § 44-2127 (Cum. Supp. 1992).

NAICO is a wholly owned subsidiary of Chandler (U.S.A.), Inc., which is an Oklahoma Corporation. Chandler, U.S.A, is a wholly owned subsidiary of Chandler Insurance (Barbados) Ltd., which is a Barbados Corporation. Chandler Insurance is in turn a wholly owned subsidiary of Chandler Insurance Company, Ltd., which is a Cayman Island Corporation. These corporations are all domestic insurers within the meaning of Neb. Rev. Stat. § 44-2126(2) (Cum. Supp. 1992).

Control of Chandler Insurance Company, Ltd. determines the control of NAICO, its subsidiary. As in the order of the Department of Insurance, all of the above entities and their officers, directors and employees will be referred to as Chandler Insurance.

This case involves an application seeking approval of a change in control of a domestic insurance company pursuant to the Act. Section 44-2126 provides that no person may acquire "control" of a Nebraska domestic

insurer unless a FORM A-Statement regarding Acquisition of Control has been filed with and approved by the Director of the Department. Neb. Rev. Stat. § 44-2126(1) (Cum. Supp. 1992).

"Control" is defined as "the power to direct or cause the direction of the management and policies of a person. . . . " and is presumed to exist if one owns more than 10% of the voting securities of the insurer. Neb. Rev. Stat. § 44-2121(2) (Cum. Supp. 1992). One can rebut this presumption of control by filing a FORM B-Disclaimer of Affiliation and Control with the Director. Neb. Rev. Stat. §§ 44-2121(2) and 44-2132(1) (Cum. Supp. 1992).

The applicants in this proceeding are CenTra, Inc., Can-Am Investments, Ltd., Ammex, Inc., DuraRock Underwriters, Ltd. and Manuel J. Moroun. CenTra is a Delaware Corporation and has its principal place of business in Warren, Michigan. It is a holding company which directly or indirectly owns at least 80% of the voting securities of a group of other corporations engaged in motor freight transportation and other businesses. Moroun, President of CenTra owns 49.88% of CenTra's common stock. Moroun's father and Moroun's three sisters own the remaining CenTra common stock. Other principal officers are Ronald Lech, executive Vice-President and Assistant Secretary, and Norman Harned, Vice President and Treasurer. CenTra, Moroun, and Ammex together held 22.7% of the stock of Chandler at the time of the hearing. Can-Am Investment formed in July, 1992, is a Bahamian corporation. Harned, Lech and R.E. Berquist, Sr. are the directors of Can-Am. Can-Am has purchased 26.5% of Chandler Insurance stock. Ammex is a Michigan corporation of which Moroun owns 100% of the

voting securities. Ammex operates two duty free stores in Detroit, Michigan. DuraRock is a corporation registered under the Barbados Exempt Insurance Act of 1983. It is a reinsurance company whose entire voting securities are owned by the Manuel J. Moroun Irrevocable Trust for Matthew T. Moroun, Moroun's son.

Moroun is Chairman and Chief Executive Officer of the Detroit International Bridge Company and the Chairman and Chief Executive Officer of Ammex. He owns percentages of voting securities in CenTra (49.88%); Liberty Bell Agency, Inc. (51.34%); U.S. Truck Company, Inc. (51.34%); Lakeshore Properties of Michigan, Inc. (100%); E-Quip Corporation (51.34%); and Ammex (100%). Moroun controls all of the applicants in this case.

NAICO is indirectly owned and controlled by Chandler Insurance. In 1987, CenTra and NAICO entered into an insuring agreement. NAICO issued a number of workers' compensation, automobile and general liability insurance policies, covering CenTra and its affiliates. These policies were reinsured through Can-Am and its successor DuraRock. CenTra also acquired stock in NAICO's parent corporation, thereby obtaining an ownership interest in NAICO.

It was in 1989 that CenTra filed an application with the Department of Insurance pursuant to the Act disclaiming any control of NAICO. The disclaimer was approved.

Then in 1991, Chandler Insurance and NAICO contemplated converting Chandler Insurance into a privately held corporation. The applicants and the management of Chandler Insurance discussed taking Chandler Insurance

private and negotiated over the ownership interest the applicants would have. Funds within Chandler Barbados and from other sources were to be used to purchase Chandler Insurance shares.

However, no agreement was reached. Management proceeded alone with a public tender offer on July 9, 1992, but on July 22, 1992, they withdrew the tender offer.

The applicants between July 1 and July 16, managed to acquire additional shares of Chandler Insurance. Altogether, they owned 49.2% of the issued stock of Chandler Insurance. The applicants then filed the application at issue in this case with the director under the Act, seeking approval to acquiring control of NAICO.

Administrative bodies have only that "authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act." *In re: Application A-16642*, 236 Neb. 671,705,463 N.W.2d 591,613 (1990).

The purpose of the Act is to protect the policy holders by probing the competence of those seeking to control insurance companies. The Act defines control of an insurance company as the power to direct management through the ownership of securities. The Act provides that no one can gain control through the purchase of stock until that Purchase is approved by the director, Neb. Rev. Stat. § 44-2126. In the present case, the applicants did not seek prior approval before acquiring the stock. In order for the department to effectively carry out the purpose of the statute, it must have authority to handle situations of persons who purchase stock without approval. The department did not act beyond the powers

granted to it under § 44-2126 by requiring prior notice of any potential sale of Chandler stock by the applicants nor did the department act beyond its implied powers by requiring prior notice of any attempted sale by the applicants.

The order is not a prohibition of the sale of their shares, but a requirement of prior notice to the department so it can examine the transaction prior to sale to ensure that the applicants do not continue their illegal control.

I. Evidentiary Rulings:

A. The Excluded Evidence.

The applicants attempted to draw testimony from Mr. Robert O'Neill, a private investigator hired by the applicants to research the character and integrity of Moroun concerning the character of Mr. Charles Garavaglia, a former employee of CenTra. Garavaglia's deposition testimony was offered by the applicants on the issue of Moroun's character and integrity. O'Neill also investigated Garavaglia. The hearing officer refused to allow O'Neill to give his opinions of the allegations Garavaglia had made concerning Mr. Moroun in a lawsuit Garavaglia had filed against Moroun and his company. The applicants contend that the character letters and testimony concerning Garavaglia's opinions should be admitted as a basis for O'Neill's opinions. They claim that O'Neill was an "expert" witness on the character of Moroun. However, as the record reveals, O'Neill's investigation of

Moroun was not sufficient for the formation of expert opinion.

Likewise, his investigation of Garavaglia was insufficient due to incomplete background information given to him. As the record shows, O'Neill's investigation of both Moroun and Garavaglia were not complete enough to allow the formation of an opinion with any probative value. Thus, the court finds that the exclusion of documents and testimony to support that opinion was not error.

B. The Admitted Evidence.

The applicants contend the admission of three letters offered by the Chandler parties was error.

Exhibit 1069 is a letter from Steve Butler to Ramnath Maraj. Butler was both an employee of Chandler and Resident Manager of DuraRock at the time the letter was written. The Chandler parties claim that he was writing the letter as the Manager for DuraRock. This is shown by the signature line on the letter which reads, "Steven R. Butler, Financial Director, Chandler Insurance Management, Ltd., as managers for DuraRock Underwriters Ltd." Butler authenticated the document and testifies at the department of insurance hearing, that the letter was a record kept in the ordinary course of his business activities for DuraRock. Thus, the court finds that Exhibit 1069 was properly admitted.

Exhibits 1028 and 1041 were letters written by the Supervisor of Insurance to confirm his decision that the debenture which DuraRock planned to treat as share

capital for solvency purposes, would not be allowed. Although the letters were not created by DuraRock, these letters were maintained in DuraRock files in the ordinary course of business. Neb. Rev. Stat. § 27-803(6).

In *Bobby Brooks, Inc. v. Hyatt*, 195 Neb. 596, 239 N.W.2d 782 (1976), the Nebraska Supreme Court held that the testimony on the manner of preparation did not have to be based on personal knowledge and the offering witness need not be the custodian of the record at the time that the document was made.

Exhibits 1028 and 1041 were documents produced by a government official in Barbados during the usual course of his regulatory duties. The hearing record shows that Butler testified that documents of this type from the supervisor, are received in the ordinary course of business. The court finds that these records were properly admitted under the business records exception to the hearsay rule.

II. Denial of CenTra's Form A Application.

This court finds that the competence, experience and integrity of the applicant is such that it is not in the best interests of the policy holders for the applicants to have control of Chandler Insurance. The court also finds that the financial condition of the applicants might jeopardize the financial stability of NAICO or prejudice the policy holders if the applicants have control of Chandler Insurance. Thus, this court finds that the hearing officer did not error in concluding that CenTra's Form A Application should be denied.

A. The Financial Condition of Applicants.

The testimony in the record indicates that CenTra is having cash flow problems. CenTra's Vice-President and Chief Financial Officer, Mr. Harned's testimony revealed that CenTra was behind on its insurance payments. This caused CenTra to be unable to settle with all suppliers and vendors in a timely manner. The testimony of Dr. James R. Adler, a certified public accountant, suggests that Moroun has been using CenTra assets for personal use. The deposition testimony of Paul Maestri, a director of Chandler Insurance and former stockholder of P.A.M. Transportation Services, also indicates that Moroun used the assets of other CenTra companies for his own personal use. This indicates a strong possibility Moroun would use the assets of Chandler Insurance of [sic] his personal use as well.

Mr. Adler explained that working capital should be the most liquid asset of a company to be used for day to day operations. He stated that CenTra's working capital is both greatly overstated and misleading. CenTra includes in its working capital $8,000,000, which is tied up in Chandler stock as well as a Michigan Bank, receivables form P.A.M. and investments in Lakeshore Properties as current assets. According to Adler, these investments may not be included as current assets. First of all, Manual J. Moroun Trust for Matthew Moroun controls P.A.M. Second, only temporary liquid investments may be included in working capital and both Lech and Harned testified that Chandler investment was long term.

This lack of working capital affects CenTra's ability to pay back its loans. CenTra has violated its loan covenants and when CenTra's bank stops waiving these violations, these loans could be called. CenTra's working capital would not cover such an expenditure.

An example of CenTra's cash shortage, is its inability to pay premium owed to NAICO. CenTra has been late with its premium continually and it worsened in 1990-1991. On May 23, 1991, Margaret Rohn wrote a memo to Jill Clair regarding premium owed to NAICO, $3,674,687 was past due. Ms. Rohn wrote, "talking with Charlie Gutwald, there doesn't seem to be any funds currently."

In February 1992, CenTra, NAICO and NAICO Indemnity, were four and one half months into a new insurance program, but CenTra had yet to pay a single premium dollar. Approximately $6.2 million was due. NAICO was forced to withhold payment owed to Liberty Bell. In May 1992, a letter concerning premiums came to Jill Clair and she determined CenTra owed $5,908,932, but only had $958,332 available.

This court finds there is evidence that CenTra is having cash flow problems, which would not be in the best interest of NAICO policy holders. The Hearing Officer did not error in concluding CenTra's financial condition presents a grave risk to NAICO if control were approved.

B. The Competence, Experience and Integrity of Applicant.

The record indicates that Can-Am was greatly underreserved as of June 30, 1990. A memo dated April 23, 1991 to M.J. Moroun and Tom Lech from Beryl Shroyer, a vice president in CenTra's accounting department, discussed the problem with getting Can-Am a clean audit. Can-Am was $8,000,000 underreserved.

Can-Am liquidated and transferred 2 assets and liabilities to a newly formed reinsurance company called DuraRock. Thus, no audited financial statement was issued for Can-Am for the year ending June 30, 1990 and the solvency issue was avoided.

Audited financial statements for DuraRock for the year ending June 30, 1991 were not issued until April 30, 1992. DuraRock was also underreserved. It was not until filing of the application to purchase NAICO that a combined audited financial statement of Can-Am and DuraRock was issued for the period ending June 30, 1992. It showed that the reserves were adequate when the operations were combined.

The record shows that Price Waterhouse found a $13 million shortfall in March of 1992. A debenture was issued by DuraRock to M.J. Moroun Trust allegedly in consideration for the value of the stock the M.J. Moroun Trust held in Can-Am prior to its liquidation. The face value of this debenture was $3,685,000. Lech purchased the debenture for $10,000 and then sold it to the Trustee for the M.J. Moroun Irrevocable Trust for Matthew T. Moroun three days later for $15,000. The Trustee then

assigned the debenture to DuraRock as a capital contribution for the face amount of $3,685,000. This was done despite the fact the Minister of Finance for Barbados had stated that the debenture would not be accepted as capital necessary to meet the solvency requirements.

CenTra also wanted to use an unsecured note of $3 million to create capital in DuraRock, although they were informed by Price Waterhouse that an entry recording the $3,000,000 as paid in capital, was not valid. It was not until DuraRock's Resident Manager, Steve Butler, told the CenTra management he was going to report the situation to the Barbados Supervisor of Insurance, that the note was cancelled. It was corrected by a $3,000,000 retrospective premium owed by CenTra to DuraRock.

The record also shows that the applicants have not been concerned with meeting the requirements of the Nebraska Insurance Department. The applicants were aware of the Form A requirement yet did not file an application before attempting to acquire stock privately. The applicants continued to make tender offers to purchase stock even after the department ordered them to cease. Although the applicant placed the stock in a trust in which the ownership of stock would be transferred to Can-Am and voting of shares would be conditioned on approval of the Form A Application, the applicants still violated the department's cease and desist orders. Can-Am was formed after the purchases of Chandler stock and after the director issued the first cease and desist orders.

Can-Am's shareholders consist of Moroun's father-in-law, Robert E. Berquist, Sr., CenTra employees,

Moroun's personal financial advisor and CenTra officer and director, Harned, another CenTra officer and director, Lech and employees or retirees of CenTra affiliates. Moroun provided the financing for Can-Am purchased of Chandler stock. It seems apparent that Moroun has considerable control over Can-Am.

Harned testified that Can-Am investors took part in the formation of Can-Am to protect CenTra's investment in Chandler, but at least one investor said the reason CenTra and Moroun pushed, or the investment, was to protect CenTra's insurance premiums.

The record indicates many instances where CenTra has placed its own interests before Chandler or NAICO and the regulations of the Department of Insurance, calling into question the applicants' competence, experience and integrity to control NAICO.

. . .

The Court finds that the order of the Director of Department of Insurance be, and it is hereby affirmed.

Costs taxed to plaintiffs.

Dated this 21st day of September, 1993.

/s/ William Blue
DISTRICT COURT JUDGE

APPENDIX 4

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

January 4, 1996

David A. Domina
DOMINA COPPLE LAW FIRM
1065 North 115th St., Ste. 150
Omaha, NE 68154

IN CASE OF: S-93-0964, Centra, Inc. v. Chandler Insurance Company

Appellants/Motion for Rehearing & Brf filed 12/11/95 **has been reviewed by the court and the following order entered:**

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

APPENDIX 5

44-2120. Act, how cited. Sections 44-2120 to 44-2153 shall be known and may be cited as the Insurance Holding Company System Act.

Source: Laws 1991, LB 236, § 1.

44-2121. Terms, defined. For purposes of the Insurance Holding Company System Act:

(1) An affiliate of, or person affiliated with, a specific person shall mean a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the person specified;

(2) Control, including controlling, controlled by, and under common control with, shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by subsection (11) of section 44-2132 that control does not exist in fact. The director may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific

findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect;

(3) Director shall mean the Director of Insurance;

(4) An insurance holding company system shall consist of two or more affiliated persons, one or more of which is an insurer;

(5) Insurer shall have the same meaning as set forth in section 44-103, except that insurer shall not include (a) agencies, authorities, or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state or (b) fraternal benefit societies;

(6) Person shall mean an individual, a corporation, a partnership, a limited partnership, an association, a joint-stock company, a trust, an unincorporated organization, any similar entity, or any combination of such entities acting in concert but shall not include any joint-venture partnership exclusively engaged in owning, managing, leasing, or developing real or tangible personal property;

(7) Security holder of a specified person shall mean one who owns any security of such person, including common stock, preferred stock, debt obligations, and any other security convertible into or evidencing the right to acquire any such stock or obligations;

(8) Subsidiary of a specified person shall mean an affiliate controlled by such person directly or indirectly through one or more intermediaries; and

(9) Voting security shall include any security convertible into or evidencing a right to acquire a voting security.

Source: Laws 1991, LB 236, § 2.

44-2122. Subsidiaries of insurers; authorized. In addition to the authority granted in Chapter 44, any domestic insurer, either by itself or in cooperation with one or more persons, may, subject to the limitations set forth in the Insurance Holding Company System Act, organize or acquire one or more subsidiaries engaged in the following kinds of business:

(1) Any kind of insurance business authorized by the jurisdiction in which it is incorporated;

(2) Acting as an insurance broker or as an insurance agent for its parent or for any subsidiaries of its parent which are insurers;

(3) Investing, reinvesting, or trading in securities for its own account or that of its parent, any subsidiary of its parent, or any affiliate or subsidiary;

(4) Management of any investment company subject to or registered pursuant to the Investment Company Act of 1940, as amended, including related sales and services;

(5) Acting as a broker-dealer subject to or registered pursuant to the Securities Exchange Act of 1934, as amended;

(6) Rendering investment advice to governments, government agencies, corporations, or other organizations or groups;

(7) Rendering other services related to the operations of an insurance business, including actuarial, loss prevention, safety engineering, data processing, accounting, claims, appraisal, and collection services;

(8) Ownership and management of assets which the parent could itself own or manage. The aggregate investment by the insurer and its subsidiaries acquired or organized pursuant to this section shall not exceed the limitations applicable to such investments by the insurer;

(9) Acting as administrative agent for a governmental instrumentality which is performing an insurance function;

(10) Financing of insurance premiums, agents, and other forms of consumer financing;

(11) Any other business activity determined by the director to be reasonably ancillary to an insurance business; or

(12) Owning a corporation or corporations engaged or organized to engage exclusively in one or more of the businesses specified in this section.

Source: Laws 1991, LB 236, § 3.

44-2123. Additional investments authorized. In addition to investments in common stock, preferred stock, debt obligations, and other securities permitted under Chapter 44, a domestic insurer may also:

(1) Invest, in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries, amounts which do not exceed the lesser of five percent of such insurer's assets or fifty percent of such

insurer's policyholders surplus if, after such investments, the insurer's policyholders surplus will be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs. In calculating the amount of such investments, investments in domestic or foreign insurance subsidiaries shall be excluded and there shall be included:

(a) Total net funds or other consideration expended and obligations assumed in the acquisition or formation of a subsidiary, including all organizational expenses and contributions to capital and surplus of such subsidiary whether or not represented by the purchase of capital stock or issuance of other securities; and

(b) All amounts expended in acquiring additional common stock, preferred stock, debt obligations, and other securities and all contributions to the capital or surplus of a subsidiary subsequent to its acquisition or formation;

(2) Invest any amount in common stock, preferred stock, debt obligations, and other securities of one or more subsidiaries engaged or organized to engage exclusively in the ownership and management of assets authorized as investments for the insurer if each such subsidiary agrees to limit its investments in any asset so that such investments will not cause the amount of the total investment of the insurer to exceed any of the investment limitations specified in subdivision (1) of this section or in Chapter 44 applicable to the insurer. For

purposes of this subdivision, the total investment of the insurer shall include:

(a) Any direct investment by the insurer in an asset; and

(b) The insurer's proportionate share of any investment in an asset by any subsidiary of the insurer, which share shall be calculated by multiplying the amount of the subsidiary's investment by the percentage of the ownership of such subsidiary; and

(3) With the approval of the director, invest any greater amount in common stock, preferred stock, debt obligations, or other securities of one or more subsidiaries if after such investment the insurer's policyholders surplus will be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

Source: Laws 1991, LB 236, § 4; Laws 1993, LB 583, § 83.

44-2124. Additional investments; qualification; when determined. Whether any investment pursuant to section 44-2123 meets the applicable requirements thereof shall be determined before such investment is made by calculating the applicable investment limitations as though the investment had already been made, taking into account the then outstanding principal balance on all previous investments in debt obligations, and the value of all previous investments in equity securities as of the day they were made, net of any return of capital invested, not including dividends.

Source: Laws 1991, LB 236, § 5.

44-2125. Investments in subsidiary; disposal; when. If an insurer ceases to control a subsidiary, it shall dispose of any investment made in the subsidiary pursuant to sections 44-2122 to 44-2124 within three years from the time of the cessation of control or within such further time as the director may prescribe unless, at any time after such investment has been made, such investment has met the requirements for investment under any other provision of Chapter 44 and the insurer has notified the director thereof.

Source: Laws 1991, LB 236, § 6.

44-2126. Acquisition of control of or merger with domestic insurer; filing requirements. (1) No person other than the issuer shall make a tender offer for or a request or invitation for tenders of, or enter into any agreement to exchange securities for, or seek to acquire, or acquire, in the open market or otherwise, any voting security of a domestic insurer if, after the consummation thereof, such person would, directly or indirectly, or by conversion or by exercise of any right to acquire, be in control of such insurer, and no person shall enter into an agreement to merge with or otherwise to acquire control of a domestic insurer or any person controlling a domestic insurer unless, at the time any such offer, request, or invitation is made or any such agreement is entered into, or prior to the acquisition of such securities if no offer or agreement is involved, such person has filed with the director and has sent to such insurer, a statement containing the information required by this section and such offer, request, invitation, agreement, or acquisition has been approved by the director in the manner prescribed in section 44-2127.

(2) For purposes of this section, a domestic insurer shall include any person controlling a domestic insurer unless such person as determined by the director is either directly or through its affiliates primarily engaged in business other than the business of insurance. For purposes of this section, person shall not include any securities broker holding, in the usual and customary brokers function, less than twenty percent of the voting securities of an insurance company or of any person which controls an insurance company.

(3) The statement required to be filed with the director under this section shall be made under oath and shall contain the following information:

(a) The name and address of each person by whom or on whose behalf the merger or other acquisition of control referred to in subsection (1) of this section is to be effected and either:

(i) If such person is an individual, his or her principal occupation, all offices and positions held during the past five years, and any conviction of crimes other than minor traffic violations during the past ten years; or

(ii) If such person is not an individual, a report of the nature of its business operations during the past five years or for such lesser period as such person and any predecessors thereof have been in existence, an informative description of the business intended to be done by such person and such person's subsidiaries, and a list of all individuals who are or who have been selected to become directors of executive officers of such person or who perform or will perform functions appropriate to

such positions. Such list shall include for each such individual the information required by subdivision (i) of this subdivision;

(b) The source, nature, and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a description of any transaction in which funds were or are to be obtained for any such purpose, including any pledge of the insurer's stock or the stock of any of its subsidiaries or controlling affiliates, and the identity of persons furnishing such consideration, except that when a source of such consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential if the person filing such statement so requests;

(c) Fully audited financial information as to the earnings and financial condition of each acquiring party for the preceding five fiscal years of each such acquiring party or for such lesser period as such acquiring party and any predecessors thereof have been in existence and similar unaudited information as of a date not earlier than ninety days prior to the filing of the statement;

(d) Any plans or proposals which each acquiring party may have to liquidate such insurer, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure or management;

(e) The number of shares of any security referred to in subsection (1) of this section which each acquiring party proposes to acquire, the terms of the offer, request, invitation, agreement, or acquisition referred to in subsection (1) of this section, and a statement as to the

method by which the fairness of the proposal was arrived at;

(f) The amount of each class of any security referred to in subsection (1) of this section which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party;

(g) A full description of any contracts, arrangements, or understandings with respect to any security referred to in subsection (1) of this section in which any acquiring party is involved, including transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies. Such description shall identify the persons with whom such contracts, arrangements, or understandings have been entered into;

(h) A description of the purchase of any security referred to in subsection (1) of this section during the twelve calendar months preceding the filing of the statement by any acquiring party, including the dates of purchase, names of the purchasers, and consideration paid or agreed to be paid therefor;

(i) A description of any recommendations to purchase any security referred to in subsection (1) of this section made during the twelve calendar months preceding the filing of the statement by any acquiring party or by anyone based upon interviews or at the suggestion of such acquiring party;

(j) Copies of all tender offers for, requests, or invitations for tenders of, exchange offers for, and agreements to acquire or exchange any securities referred to in subsection (1) of this section and, if distributed, of additional soliciting material relating thereto;

(k) The term of any agreement, contract, or understanding made with or proposed to be made with any broker-dealer as to solicitation of securities referred to in subsection (1) of this section for tender and the amount of any fees, commissions, or other compensation to be paid to broker-dealers with regard thereto; and

(l) Such additional information as the director may by rule or regulation prescribe as necessary or appropriate for the protection of policyholders of the insurer or in the public interest.

(4) If the person required to file the statement is a partnership, limited partnership, syndicate, or other group, the director may require that the information called for by subsection (3) of this section shall be given with respect to each partner of such partnership or limited partnership, each member of such syndicate or group, and each person who controls such partner or member. If any such partner, member, or person is a corporation or the person required to file the statement is a corporation, the director may require that the information called for by subsection (3) of this section shall be given with respect to such corporation, each officer and director of such corporation, and each person who is directly or indirectly the beneficial owner of more than ten percent of the outstanding voting securities of such corporation.

(5) If any material change occurs in the facts set forth in the statement filed with the director and sent to such insurer pursuant to this section, an amendment setting forth such change, together with copies of all documents and other material relevant to such change, shall be filed with the director and sent to such insurer within two business days after the person learns of such change.

(6) If any offer, request, invitation, agreement, or acquisition referred to in subsection (1) of this section is proposed to be made by means of a registration statement under the Securities Act of 1933, in circumstances requiring the disclosure of similar information under the Securities Exchange Act of 1934, or under a state law requiring similar registration or disclosure, the person required to file the statement may utilize such documents in furnishing the information called for by the statement.

Source: Laws 1991, LB 236, § 7.

44-2127. Merger; acquisition; approval by director; hearings; experts. (1) The director shall approve any merger or other acquisition of control referred to in subsection (1) of section 44-2126 unless, after a public hearing thereon, he or she finds that:

(a) After the change of control, the domestic insurer would not be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;

(b) The effect of the merger or other acquisition of control would be substantially to lessen competition in

insurance in this state or tend to create a monopoly therein;

(c) The financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer or prejudice the interest of policyholders of the insurer;

(d) The plans or proposals which the acquiring party has to liquidate the insurer, to sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure of management are unfair and unreasonable to policyholders of the insurer and not in the public interest;

(e) The competence, experience, and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; or

(f) The acquisition is likely to be hazardous or prejudicial to the public.

(2) The public hearing referred to in subsection (1) of this section shall be held within thirty days after the statement required by subsection (1) of section 44-2126 is filed, and at least twenty days' notice thereof shall be given by the director to the person filing the statement. Not less than seven days' notice of such public hearing shall be given by the person filing the statement to the insurer and to such other persons as may be designated by the director. The director shall make a determination within thirty days after the conclusion of such hearing. At such hearing, the person filing the statement, the insurer,

any person to whom notice of hearing was sent, and any other person whose interest may be affected thereby shall have the right to present evidence, examine and cross-examine witnesses, and offer oral and written arguments and in connection therewith shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in the district court. All discovery proceedings shall be concluded not later than three days prior to the commencement of the public hearing.

(3) The director may retain at the acquiring person's expense any attorneys, actuaries, accountants, and other experts who are not employees of the Department of Insurance as may be reasonably necessary to assist the director in reviewing the proposed acquisition of control.

Source: Laws 1991, LB 236, § 8.

44-2128. Merger; acquisition; exempt transactions. Section 44-2126 shall not apply to:

(1) Any transaction which is subject to the provisions of sections 44-224.01 to 44-224.10 and the Nebraska Business Corporation Act, except as otherwise provided in Chapter 44, dealing with the merger or consolidation of two or more insurers; or

(2) Any offer, request, invitation, agreement, or acquisition which the director by order shall exempt therefrom as (a) not having been made or entered into for the purpose and not having the effect of changing or influencing the control of a domestic insurer or (b) otherwise not comprehended within the purposes of section 44-2126.

Source: Laws 1991, LB 236, § 9.

44-2129. Merger; acquisition; prohibited acts. (1) It shall be a violation of section 44-2126 to fail to file any statement, amendment, or other material required to be filed under such section.

(2) It shall be a violation of section 44-2127 to effectuate or attempt to effectuate an acquisition of control of or merger with a domestic insurer unless the director has given his or her approval thereto.

Source: Laws 1991, LB 236, § 10.

44-2130. Merger; acquisition; jurisdiction; consent to service of process. The courts of this state are hereby vested with jurisdiction over every person not resident, domiciled, or authorized to do business in this state who files a statement with the director under section 44-2126 and over all actions involving such person arising out of violations of section 44-2126 or 44-2127, and each such person shall be deemed to have performed acts equivalent to and constituting an appointment by such a person of the director to be such person's attorney upon whom may be served all lawful process in any action, suit, or proceeding arising out of violations of such sections. Copies of all such lawful process shall be served on the director and transmitted by registered or certified mail by the director to such person at his or her last-known address.

Source: Laws 1991, LB 236, § 11.

44-2131. Fees. The total fee for filing the documents required by sections 44-2126 to 44-2130 and all

amendments to such filings shall be one thousand dollars. The initial fee for registration required by the provisions of section 44-2132 shall be one thousand dollars, and an additional fee of two hundred dollars shall be payable on August 1 of each calendar year thereafter so long as such registration continues and after 1993 on March 1 of each calendar year thereafter so long as such registration continues. The fees provided for by this section shall be payable to the Department of Insurance and shall be remitted to the State Treasurer for credit to the Department of Insurance Cash Fund.

Source: Laws 1991, LB 236, § 34; Laws 1993, LB 583, § 84.

44-2132. Registration of insurers. (1) Every insurer which is authorized to do business in this state and which is a member of an insurance holding company system shall register with the director, except that registration shall not be required for a foreign insurer subject to registration requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this section, subsection (1) of section 44-2133, sections 44-2134 and 44-2136, and either subsection (2) of section 44-2133 or a provision such as the following: Each registered insurer shall keep current the information required to be disclosed in its registration statement by reporting all material changes or additions within fifteen days after the end of the month in which it learns of each such change or addition. Any insurer which is subject to registration under this section shall register within fifteen days after it becomes subject to registration and annually

thereafter by March 1 of each year for the previous calendar year unless the director for good cause shown extends the time for such initial or annual registration and then within such extended time. The director may require any insurer which is authorized to do business in the state, which is a member of an insurance holding company system, and which is not subject to registration under this section to furnish a copy of the registration statement, the summary specified in subsection (3) of this section, or other information filed by such insurer with the insurance regulatory authority of its domiciliary jurisdiction.

(2) Every insurer subject to registration shall file the registration statement on a form prescribed by the National Association of Insurance Commissioners which shall contain the following current information:

(a) The capital structure, general financial condition, ownership, and management of the insurer and any person controlling the insurer;

(b) The identity and relationship of every member of the insurance holding company system;

(c) The following agreements in force and transactions currently outstanding or which have occurred during the last calendar year between such insurer and its affiliates:

(i) Loans, other investments, or purchases, sales, or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;

(ii) Purchases, sales or exchanges of assets;

(iii) Transactions not in the ordinary course of business;

(iv) Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;

(v) All management agreements, service contracts, and cost-sharing arrangements;

(vi) Reinsurance agreements;

(vii) Dividends and other distributions to shareholders; and

(viii) Consolidated tax allocation agreements;

(d) Any pledge of the insurer's stock, including stock of any subsidiary or controlling affiliate, for a loan made to any member of the insurance holding company system; and

(e) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the director.

(3) All registration statements shall contain a summary outlining all items in the current registration statement representing changes from the prior registration statement.

(4) It shall not be necessary to disclose on the registration statement information which is not material for the purposes of this section. Unless the director by rule, regulation, or order provides otherwise, sales, purchases, exchanges, loans, or extensions of credit, investments, or guarantees involving one-half of one percent or less of an insurer's admitted assets as of December 31 next preceding shall not be deemed material for purposes of this section.

(5) Subject to section 44-2134, each registered insurer shall report to the director all dividends and other distributions to shareholders within fifteen business days following the declaration thereof.

(6) Any person within an insurance holding company system subject to registration shall be required to provide complete and accurate information to an insurer when such information is reasonably necessary to enable the insurer to comply with the Insurance Holding Company System Act.

(7) The director shall terminate the registration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.

(8) The director may require or allow two or more affiliated insurers subject to registration under this section to file a consolidated registration statement.

(9) The director may allow an insurer which is authorized to do business in this state and which is part of an insurance holding company system to register on behalf of any affiliated insurer which is required to register under subsection (1) of this section and to file all

information and material required to be filed under this section.

(10) This section shall not apply to any insurer, information, or transaction if and to the extent that the director by rule, regulation, or order exempts the same from this section.

(11) Any person may file with the director a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with such person unless and until the director disallows such a disclaimer. The director shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support such disallowance.

(12) The failure to file a registration statement or any summary of the registration statement thereto required by this section within the time specified for such filing shall be a violation of this section.

Source: Laws 1991, LB 236, § 12.

44-2133. Transactions within an insurance holding company system. (1) Transactions within an insurance holding company system to which an insurer subject to

registration is a party shall be subject to the following standards:

(a) The terms shall be fair and reasonable;

(b) Charges or fees for services performed shall be reasonable;

(c) Expenses incurred and payment received shall be allocated to the insurer in conformity with customary insurance accounting practices consistently applies;

(d) The books, accounts, and records of each party to all such transactions shall be so maintained as to clearly and accurately disclose the nature and details of the transactions, including such accounting information as is necessary to support the reasonableness of the charges or less to the respective parties; and

(e) The insurer's policyholders surplus following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(2) The following transactions involving a domestic insurer and any person in its insurance holding company system may not be entered into unless the insurer has notified the director in writing of its intention to enter into such transaction at least thirty days prior thereto or such shorter period as the director may permit and the director has not disapproved it within such period:

(a) Sales, purchases, exchanges, loans, or extension of credit, guarantees, or investments if such transactions are equal to or exceed (i) with respect to an insurer other than a life insurer, the lesser of three percent of the

insurer's admitted assets or twenty-five percent of policyholders surplus as of December 31 next preceding and (ii) with respect to life insurers, three percent of the insurer's admitted assets as of December 31 next preceding;

(b) Loans or extensions of credit to any person who is not an affiliate, when the insurer makes such loans or extensions of credit with the agreement or understanding that the proceeds of such transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in any affiliate of the insurer making such loans or extensions of credit if such transactions are equal to or exceed (i) with respect to an insurer other than a life insurer, the lesser of three percent of the insurer's admitted assets or twenty-five percent of policyholders surplus as of December 31 next preceding and (ii) with respect to life insurers, three percent of the insurer's admitted assets as of December 31 next preceding;

(c) Reinsurance agreements or modifications thereto in which the reinsurance premium or a change in the insurer's liabilities equals or exceeds five percent of the insurer's policyholders surplus as of December 31 next preceding, including those agreements which may require a consideration the transfer of assets from an insurer to a nonaffiliate, if an agreement or understanding exists between the insurer and nonaffiliate that any portion of such assets will be transferred to one or more affiliates of the insurer;

(d) All management agreements, service contracts, and cost-sharing arrangements;

(e) Any material transactions, specified by rule and regulation, which the director determines may adversely affect the interests of the insurer's policyholders.

Nothing in this section shall be deemed to authorize or permit any transactions which, in the case of an insurer not a member of the same insurance holding company system, would be otherwise contrary to law.

(3) A domestic insurer may not enter into transactions which are part of a plan or series of like transactions with persons within the insurance holding company system if the purpose of those separate transactions is to avoid the statutory threshold amount and thus avoid the review that would occur otherwise. If the director determines that such separate transactions were entered into over any twelve-month period for such purpose, the director may exercise his or her authority under sections 44-2143 to 44-2147.

(4) The director, in reviewing transactions pursuant to subsection (2) of this section, shall consider whether the transactions comply with the standards set forth in subsection (1) of this section and whether they may adversely affect the interest of policyholders.

(5) The director shall be notified within thirty days of any investment of the domestic insurer in any one corporation if the total investment in such corporation by the insurance holding company system exceeds ten percent of such corporation's voting securities.

Source: Laws 1991, LB 236, § 13.

44-2134. Extraordinary dividends and distributions. (1) No domestic insurer shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until (a) thirty days after the director has received notice of the declaration thereof and the director has not within such period disapproved such payment or (b) the director has approved such payment within such thirty-day period.

(2) For purposes of this section, an extraordinary dividend or distribution shall include any dividend or distribution of cash or other property the fair market value of which together with that of other dividends or distributions made within the preceding twelve months exceeds the lesser of (a) ten percent of such insurer's policyholders surplus as of December 31 next preceding or (b) the net gain from operations of such insurer if such insurer is a life insurer or the net income if such insurer is not a life insurer, not including realized capital gains for the twelve-month period ending December 31 next preceding but shall not include pro rate distributions of any class of the insurer's own securities. In determining whether a dividend or distribution is extraordinary, an insurer other than a life insurer may carry forward net income from the previous two calendar years that has not already been paid out as dividends. This carryforward shall be computed by taking the net income from the second and third preceding calendar years, not including realized capital gains, less dividends paid in the second and immediate preceding calendar years.

(3) Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the director's approval

thereof, and such a declaration shall confer no rights upon shareholders until (a) the director has approved the payment of such a dividend or distribution or (b) the director has not disapproved such payment within the thirty-day period referred to in subsection (1) of this section.

Source: Laws 1991, LB 236, § 14.

44-2135. Management of domestic insurer.

(1) Notwithstanding the control of a domestic insurer by any person, the officers and directors of the insurer shall not thereby be relieved of any obligation or liability to which they would otherwise be subject by law, and the insurer shall be managed so as to assure its separate operating identity consistent with the Insurance Holding Company System Act.

(2) Nothing in this section shall preclude a domestic insurer from having or sharing a common management or cooperative or joint use of personnel, property, or services with one or more other persons under arrangements meeting the standards of subsection (1) of section 44-2133.

(3) Not less than one-third of the directors of a domestic insurer which is a member of an insurance holding company system shall be persons who are not officers or employees of such insurer or of any entity controlling, controlled by, or under common control with such insurer and who are not beneficial owners of a controlling interest in the voting stock of such insurer or any such entity. At least one such person shall be

included in any quorum for the transaction of business at any meeting of the board of directors.

(4) Subsection (3) of this section shall to apply to a domestic insurer if the person controlling such insurer has a board of directors that meets the requirements of such subsection.

Source: Laws 1991,LB 236, § 15.

44-2136. Adequacy of surplus; factors. For purposes of the Insurance Holding Company System Act, in determining whether an insurer's policyholders surplus is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors, among others, shall be considered:

(1) The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force, and other appropriate criteria;

(2) The extent to which the insurer's business is diversified among the several liens of insurance;

(3) The number and size of risks insured in each line of business;

(4) The extent of the geographical dispersion of the insurer's insured risks;

(5) The nature and extent of the insurer's reinsurance program;

(6) The quality, diversification, and liquidity of the insurer's investment portfolio;

(7) The recent past and projected future trend in the size of the insurer's investment portfolio;

(8) The policyholders surplus maintained by other comparable insurers;

(9) The adequacy of the insurer's reserves; and

(10) The quality and liquidity of investments in affiliates. The director may treat any such investment as a disallowed asset for purposes of determining the adequacy of policyholders surplus whenever in his or her judgment such investment so warrants.

Source: Laws 1991,LB 236, § 16.

44-2137. Examination by director. (1) Subject to the limitation contained in this section and in addition to the powers which the director has under the Insurers Examination Act relating to the examination of insurers, the director shall also have the power to order any insurer registered under section 44-2132 to produce such records, books, or other information papers in the possession of the insurer or its affiliates as are reasonably necessary to ascertain the financial condition of such insurer or to determine compliance with Chapter 44. In the event such insurer fails to comply with such order, the director may examine such affiliates to obtain such information.

(2) The director may retain at the registered insurer's expense such attorneys, actuaries, accountants, and other experts who are not employees of the Department of Insurance as shall be reasonably necessary to assist in the conduct of the examination under this section. Any persons so retained shall be under the direction and control of the director and shall act in a purely advisory capacity.

(3) Each registered insurer producing for examination records, books, and papers pursuant to this section shall be liable for and shall pay the expense of such examination in accordance with the Insurers Examination Act.

Source: Laws 1991, LB 236, § 17; Laws 1993, LB 583,§ 85.

Cross Reference

Insurers Examination Act, see section 44-5901.

44-2138. Information; confidential treatment. All information, documents, and copies thereof obtained by or disclosed to the director or any other person in the course of an examination or investigation made pursuant to section 44-2137 and all information reported pursuant to sections 44-2132 to 44-2136 shall be given confidential treatment, shall not be subject to subpoena, and shall not be made public by the director, the National Association of Insurance Commissioners, or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains unless the director, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of policyholders, shareholders, or the public will be served by the publication thereof, in which event he or she may publish all or any part thereof in such manner as he or she may deem appropriate.

Source: Laws 1991, LB 236, § 18.

44-2139. Director; rules and regulations. The director shall adopt and promulgate such rules and regulations and issue such orders as necessary to carry out the Insurance Holding Company System Act.

Source: Laws 1991, LB 236, § 19.

44-2140. Injunctions. Whenever it appears to the director that any insurer or any director, officer, employee, or agent thereof has committed or is about to commit a violation of the Insurance Holding Company System Act or of any rule, regulation, or order of the director, the director may apply to the district court of Lancaster County for an order enjoining such insurer, director, officer, employee, or agent from violating or continuing to violate the act or any such rule, regulation, or order and for such other equitable relief as the nature of the case and the interest of the insurer's policyholders, creditors, and shareholders or the public may require.

Source: Laws 1991, LB 236, § 20.

44-2141. Voting of securities; when prohibited; injunction. No security which is the subject of any agreement of arrangement regarding acquisition, or which is acquired or to be acquired, in contravention of the Insurance Holding Company System Act or of any rule, regulation, or order of the director may be voted at any shareholder's meeting or may be counted for quorum purposes, and any action of shareholders requiring the affirmative vote of a percentage of shares may be taken as though such securities were not issued and outstanding, but no action taken at any such meeting shall be invalidated by the voting of such securities unless the action would materially affect control of the insurer or unless

the courts of this state have so ordered. If an insurer or the director has reason to believe that any security of the insurer has been or is about to be acquired in contravention of the act or of any rule, regulation, or order of the director, the insurer or the director may apply to the district court of Lancaster County for an order to enjoin any officer, request, invitation, agreement, or acquisition made in contravention of sections 44-2126 to 44-2130 or any rule, regulation, or order of the director to enjoin the voting of any security so acquired, to void any vote of such security already cast at any meeting of shareholders, and for such other equitable relief as the nature of the case and the interest of the insurer's policyholders, creditors, and shareholders or the public may require.

Source: Laws 1991, LB 236, § 21.

44-2142. Seizure or sequestration of voting securities. In any case when a person has acquired or is proposing to acquire any voting securities in violation of the Insurance Holding Company System Act or any rule, regulation, or order of the director, the district court of Lancaster County may, on such notice as the court deems appropriate, upon the application of the insurer or the director seize or sequester any voting securities of the insurer owned directly or indirectly by such person and issue such order with respect thereto as may be appropriate to effectuate the act. Notwithstanding any other provisions of law, for purposes of the act the sites of the ownership of the securities of domestic insurers shall be deemed to be in this state.

Source: Laws 1991, LB 236, § 22.

44-2143. Failure to file registration statement; administrative penalty. Any insurer which fails, without just cause, to file any registration statement as required by section 44-2132 may be required by the director, after notice and hearing, to pay an administrative penalty one hundred dollars for each day's delay not to exceed an aggregate penalty of ten thousand dollars. The director may reduce the penalty if the insurer demonstrates to the director that the imposition of the penalty would constitute a financial hardship to the insurer.

Source: Laws 1991, LB 236,§ 23.

44-2144. Director or officer; administrative penalty; when. Any director or officer of an insurance holding company system who knowingly violates or assents to or permits any officer or agent of the insurer to violate the requirements of subsection (1) of section 44-2132 or section 44-2133 or 44-2134 may be required by the director, after notice and hearing to pay in his or her individual capacity an administrative penalty of not more than five thousand dollars per violation. In determining the amount of the penalty, the director shall take into account the appropriateness of the penalty with respect to the gravity of the violation, the history of previous violations, and such other matters as justice may require.

Source: Laws 1991, LB 236, § 24.

44-2145. Cease and desist orders; other orders. Whenever it appears to the director that any insurer or any director, officer, employee, or agent thereof has engaged in any transaction or entered into a contract which is subject to sections 44-2133 to 44-2136 and which would not have been approved had such approval been

requested, the director may order the insurer to cease and desist immediately any further activity under that transaction or contract. After notice and hearing, the director may also order the insurer to void any such contracts and restore the status quo if such action is in the best interest of the policyholders, the creditors, or the public.

Source: Laws 1991, LB 236,§ 25.

44-2146. Violations; criminal penalty. Any insurer which willfully violates the Insurance Holding Company System Act shall be guilty of a Class IV felony. Any director, officer, employee, or agent of an insurer who willfully violates the act shall be guilty of a Class IV felony.

Source: Laws 1991, LB 236, § 26.

44-2147. False reporting; criminal penalty. Any officer, director, or employee of an insurance holding company system who willfully and knowingly subscribes to or makes or causes to be made any false statements, false reports, or false filings with the intent to deceive the director in the performance of his or her duties under the Insurance Holding Company System Act shall be guilty of a Class IV felony.

Source: Laws 1991, LB 236, § 27.

44-2148. Insurer; supervision, rehabilitation, and liquidation. If it appears to the director that any person has committed a violation of the Insurance Holding Company System Act which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, or shareholders or the public,

the director may proceed as provided in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act to take possession of the property of such domestic insurer and it conduct the business thereof.

Source: Laws 1991, LB 236, § 28.

Cross Reference

Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act, see section 44-4862.

44-2149. Recovery by receiver. (1) If an order for rehabilitation or liquidation of a domestic insurer has been entered, the receiver appointed under such order shall have a right to recover on behalf of the insurer (a) from any parent or holding company or person or affiliate who otherwise controlled the insurer, the amount of any distribution, other than distribution of shares of the same class of stock, paid by the insurer on its capital stock or (b) any payment in the form of a bonus, termination settlement, or extraordinary lump-sum salary adjustment made by the insurer or its subsidiary to a director, officer, or employee, when the distribution or payment pursuant to subdivision (a) or (b) of this subsection is made at any time during the one year preceding the filing of the petition for rehabilitation or liquidation subject to the limitations of subsections (2), (3), and (4) of this section.

(2) No such distribution or payment shall be recoverable if the parent or affiliate shows that when paid such distribution or payment was lawful and reasonable and that the insurer did not know and could not reasonably

have known that such distribution or payment might adversely affect the ability of the insurer to fulfill its contractual obligations.

(3) Any person who was a parent or holding company or a person who otherwise controlled the insurer or affiliate at the time such distribution or payment was paid shall be liable up to the amount of distribution or payment under subsection (1) of this section such person received. Any person who otherwise controlled the insurer at the time such distribution of payment was declared shall be liable up to the amount of distribution or payment he would have received if it had been paid immediately. If two or more persons are liable with respect to the same distribution or payment, they shall be jointly and severally liable.

(4) The maximum amount recoverable under subsection (3) of this section shall be the amount needed in excess of all other available assets of the impaired or insolvent insurer to pay the contractual obligations of the impaired or insolvent insurer and to reimburse any guaranty funds.

(5) To the extent that any person liable under subsection (3) of this section is insolvent or otherwise fails to pay claims due from it pursuant to such subsection, its parent or holding company or the person who otherwise controlled it at the time the distribution or payment was paid shall be jointly and severally liable for any resulting deficiency in the amount recovered from such parent or holding company or person who otherwise controlled it.

Source: Laws 1991, LB 236, § 29.

44-2150. Suspension, revocation, or nonrenewal of license or authority. If it appears to the director that any person has committed a violation of the Insurance Holding Company System Act which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the director may, after giving notice and an opportunity to be heard, determine to suspend, revoke, or reuse to renew such insurer's license or authority to do business in this state for such period as the director finds is required for the protection of policyholders or the public. Any such determination shall be accompanied by specific findings of fact and conclusions of law.

Source: Laws 1991, LB 236, § 30.

44-2151. Appeal; writ of mandamus. Any person aggrieved by any act, determination, order, or other action of the director pursuant to the insurance Holding Company System Act may appeal. The appeal shall be in accordance with the Administrative Procedure Act.

Any person aggrieved by any failure of the director to act or make a determination required by the Insurance Holding Company System Act may petition the district court of Lancaster County for a writ in the nature of a mandamus or a peremptory mandamus directing the director to act or make such determination forthwith.

Source: Laws 1991, LB 236, § 31.

Cross Reference

Administrative Procedure Act, see section 84-920

44-2152. Inconsistent laws; superseded. All laws and parts of laws of this state inconsistent with the Insurance Holding Company System Act shall be superseded with respect to matters covered by the act.

Source: Laws 1991, LB 236, § 32.

44-2153. Act; cumulative. The powers, remedies, procedures, and penalties provided in the Insurance Holding Company System Act shall be in addition to, and not in limitation of, any other powers, remedies, procedures, and penalties provided by law.

Source: Laws 1991, LB 236, § 33.

(2)

No. 95-1600

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CENTRA, INC.; CAN-AM INVESTMENTS, LTD.; AMMEX, INC.; DURAROCK UNDERWRITERS, LTD. and MANUEL J. MOROUN,

Petitioners,

vs.

CHANDLER INSURANCE COMPANY, LTD.; CHANDLER INSURANCE (BARBADOS), LTD.; CHANDLER (U.S.A.), INC.; NATIONAL AMERICAN INSURANCE COMPANY; CHANDLER AVIATION, INC.; NEBRASKA DEPARTMENT OF INSURANCE and DEAN WITTER TRUST, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nebraska

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Petitioner frames four issues for review which mischaracterize the issues determined by the courts below and are duplicative. There are just two issues which could be presented for review.

1. When an entity has illegally purchased stock to control a domestic insurance company without the prior approval required by state insurance law, and that approval is later denied, may a state insurance regulator monitor the entities' disposition of the stock, to ensure that control illegally acquired is not surreptitiously maintained?

2. Is the requirement of preapproval of the disposition of illegally acquired stock including the identity of a subsequent purchaser "the business of insurance" under the McCarren-Ferguson Act such that it is protected from the application of the Commerce Clause or otherwise a permissible burden on interstate commerce?

PARTIES INVOLVED

The Petitioner includes in the style of the case as a Respondent Chandler Aviation, Inc. Chandler Aviation, Inc. is not disclosed as an adverse party pursuant to Rule 14.1(b). Chandler Aviation, Inc. was not a party to any of the underlying actions, either before the Nebraska Department of Insurance, the District Court of Lancaster County, State of Nebraska or the Nebraska Supreme Court. It is not a proper party to this Petition for Writ of Certiorari. Likewise, Dean Witter Trust, Inc. named as a Respondent was not a party to any of the underlying actions. It is included both in the style of the case and in the disclosures made pursuant to Rule 14.1(b). However, it is not a proper party to this Petition for Writ of Certiorari.

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STATUTES INVOLVED

The McCarren-Ferguson Act provides, in pertinent part:

> No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance. . . .

15 U.S.C § 1012(b).

The Nebraska Insurance Holding Company System Act provides in pertinent part:

> (2) Control . . . shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management policies of a person, whether through the ownership of voting securities . . . or otherwise. . . . Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent or more of the voting securities of any other person.

Neb. Rev. Stat. § 44-2121(2) (Petition, A. 62).

The Nebraska Insurance Holding Company System Act provides in pertinent part:

> (1) No person other than the issuer shall make a tender offer for or a request or

> invitation for tenders of or enter into any agreement to exchange securities for, seek or acquire, or acquire, in the open market or otherwise, any voting security of a domestic insurer if, after the consummation thereof, such person would directly or indirectly . . . be in control of such insurer . . . unless, at the time of such offer . . . such person has filed with the director and . . . such offer, request, invitation, agreement or acquisition has been approved by the director. . . .

Neb. Rev. Stat. § 44-2126(1) (Petition, A. 68).

The Nebraska Insurance Holding Company System Act provides in pertinent part:

> (1) The director shall approve any merger or other acquisition of control referred to in subsection (1) of section 44-2126 unless, after a public hearing thereon, he or she finds that: . . .
>
> (c) The financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer or prejudice the interest of policyholders of the insurer; . . . .
>
> (e) The competence, experience, and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; . . . .

> (f) The acquisition is likely to be hazardous or prejudicial to the public.

Neb Rev. Stat. §44-2127(1)(c), (e) and (f). (Petition, A. 73-74).

The Nebraska Insurance Holding Company System Act provides in pertinent part:

> Seizure or sequestration of voting securities. In any case when a person has acquired or is proposing to acquire any voting securities in violation of the Insurance Holding Company System Act . . . the district court of Lancaster County may, on such notice as the court deems appropriate, upon the application of the insurer or the director seize or sequester any voting securities . . . and issue such order with respect thereto as may be appropriate to effectuate the act.

Neb Rev. Stat. § 44-2142. (Petition, A. 91).

STATEMENT OF THE CASE

There has been no assault on interstate commerce, the commerce clause or the federal government's power to regulate securities by virtue of the Nebraska Supreme Court's decision reported at 248 Neb. 844, 540 N.W.2d 318 (1995). Rather, the Nebraska Supreme Court properly applied the existing precedent to the specific facts of this case. The result is limited to the facts before the Nebraska Supreme Court and thus has no far reaching implications. Moreover, the result sought by Petitioners would abolish the power of the Nebraska Insurance Department ("Department") to regulate the ownership of domestic insurance companies, a power this Court has

recognized and approved as protected under the McCarran-Ferguson Act ("MFA") since 1969.

The purpose of the Department's Order is to address the problem which arose when Petitioners illegally acquired stock in Chandler Insurance Company, Ltd. ("Chandler") in order to control its insurance subsidiary, National American Insurance Company ("NAICO"). The Department's Order did not "suspend trading" of Chandler stock as boldly claimed by Petitioners. The plain language of the Nebraska Supreme Court's decision highlights the need for the actions ordered with respect to the stock for the protection of the policyholders:

> [T]he conduct of those entities [the Petitioners] in this litigation triggers legitimate concern that the only way for the department to protect NAICO policyholders is to retain jurisdiction over this matter and monitor applicants' disposition of their Chandler stock. . . . That the applicants broke the law is so clear that the applicants do not even raise an objection to that finding. . . .
>
> . . . Applicants' unapologetic disregard for Nebraska law raises the specter of future disregard for the interests of NAICO policyholders. . . . [T]he director may issue the necessary protective orders until the policyholders' interests are no longer jeopardized by outlaw corporate raiders.

(Petition, A. 14-17).

The transaction which is the subject of this Petition and the

preceding actions has everything to do with the business of insurance. The Nebraska Insurance Holding Company System Act, Neb. Rev. Stat. §44-2120 *et seq.* provides that the Director shall approve changes in control of a Nebraska insurance company unless he finds the potential purchaser unfit. This function is directly related to the protection of policyholders by assuring that the assets of an insurance company are not raided, rendering the policies issued to the policyholders worthless.

It is this function which is at issue in this case. In spite of Petitioners' claim that this case simply involves the denial of an ordinary application for approval of acquisition of control of a Nebraska insurance company by a presumptively innocent group of would-be stockholders, the truth of the matter is quite the contrary. In the summer of 1992, CenTra's interest in controlling NAICO, its insurance carrier, led to a three-day buying spree of Chandler stock by the Petitioners. This resulted in a hearing, known as a Form A Hearing, before the Nebraska Insurance Department ("Department") to determine whether the Petitioners (called the Applicants before the Department) were fit to control NAICO.[1] Thus, the issues in this case relate to the Petitioners' long-standing desire for control of NAICO and the Department's ability to regulate that control for the protection of the policyholders, not the usurpation of the federal regulation of securities, the imposition of restrictions on the trading of stock or cessation of trading of stock as asserted by Petitioners.

In conjunction with its initial purchase of Chandler stock, CenTra, Inc. ("CenTra") determined that it would be in its best

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1. It is important to note that while the Petitioners imply that the stock of Chandler, the ultimate parent of NAICO, is somehow not subject to the Nebraska Act, the Petitioners have never before challenged the Nebraska Insurance Department's right to regulate the ownership of NAICO by regulating the ownership of Chandler, the Holding Company. Thus, the Petitioners implied argument comes too late.

interest to have a "**controlled or at least influenced**" fronting insurance company. (Resp. 1a-2a). A controlled fronting company was felt to be important because CenTra feared that in the future there would be only a limited market for insurance fronting arrangements.[2] In fact, not only did CenTra want control of the company for its fronting arrangements, but it also wanted to directly control its own claims.

In late 1991, Chandler began considering a company self-tender to convert the publicly traded company to a privately held one. While the Petitioners seek to cast the going-private transaction as something sinister, they were participants in the negotiation of the transaction. Indeed, during the negotiations of the going-private transaction, the Petitioners sought concessions in the Articles of Incorporation which would have resulted in their control of the new private company.

Ultimately, the tender offer proceeded without CenTra. Armed with information gained through the going-private negotiations, and inside information from the boardroom, CenTra advised its broker (Dean Witter) to buy additional Chandler stock until it owned 49% of Chandler's outstanding shares — effectively thwarting the tender offer and gaining control of NAICO. Although the Petitioners characterize these actions as necessary to stop the going-private transaction, they consistently fail to mention that the fairness of the transaction could have been determined by bringing suit over that issue (something the Petitioners did eventually do by bringing suit in the United States Court for the Western District of Oklahoma).

---

2. Under a typical fronting arrangement, a licensed or admitted insurance company issues policies to an insured and then cedes the bulk of the risk to a non-admitted reinsurance company which is owned by or affiliated with the insured. Thus, the insured can control claims while at the same time securing an income tax deduction for premiums paid to the "fronting insurer".

CenTra's action to block the tender offer began on June 18, 1992 when two of CenTra's officers who sat on Chandler's Board of Directors, Norman Harned and Ronald Lech, requested a list of shareholders from Chandler. (Resp. App. 4a-5a). On June 24, 1992, Hans J. Pijls of Plunkett & Cooney, one of CenTra's counsel, wrote to the Department about the requirements to increase ownership in a Nebraska domiciled insurance company. (Resp. App. 6a-7a). On June 29, 1992, Michael Gottschalk of Kutak Rock, another of CenTra's counsel, sought documents from the Department regarding CenTra's ownership status. (Resp. App. 8a-10a). As early as July 1 and 2, 1992, CenTra made offers to acquire pledged shares and stock held by Chandler entities. (Resp. App. 11a-15a). On July 6, 1992, a press release revealed that CenTra had a tentative agreement to purchase 169,858 Chandler shares held by Cactus Southwest Corporation. (Resp. App. 16a-17a). This prompted Chandler to notify the Department of CenTra's unapproved attempt to gain control of Chandler (and thus NAICO).

Neither CenTra's private warning from the Department's counsel to discontinue its attempt to gain control of NAICO (Resp. App. 18a-19a), nor the formal Cease and Desist Orders issued July 7, July 8 and July 10, 1992 by the Department (Resp. App. 20a-36a), deterred CenTra from its determination to gain control of Chandler and its fronting arrangement. The Department's first Cease and Desist Order directed **CenTra** to cease and desist buying **NAICO** stock until a Form A Application had been **filed and approved**. (Resp. App. 31a-34a). The next day, July 8, 1992, the Department corrected its Order that **CenTra** was to cease and desist buying **Chandler** stock. (Resp. App. 35a-36a). Although fully aware of the Department's Order to stop purchasing stock, the Applicants nonetheless continued purchasing Chandler shares. On July 9, 1992, **M.J. Moroun** personally made an offer to purchase Chandler stock from Cactus Southwest Corporation. (Previously **CenTra** had made

this offer but now had been ordered by the Department to stop buying stock.) On July 9, 1992, **M.J. Moroun** personally instructed Dean Witter to commence open market purchases of Chandler stock. On July 9, 1992 Dean Witter purchased 358,600 shares of Chandler stock on the account of **Manuel J. Moroun, trustee**. Although the Department had ordered **CenTra** to cease purchasing, **Moroun**, the owner of 49% of CenTra stock and ultimate controlling person of CenTra, continued those purchases.

On Friday, July 10, 1992 the Department revised its order in the face of M. J. Moroun's continued purchase of shares. The Department ordered **CenTra, Inc., R.W. Lech, M.J. Moroun and Norman E. Harned** to cease and desist "from any and all attempts to acquire or purchase, conditionally or otherwise, directly by CenTra or indirectly by its affiliates, or in any other manner acquire or attempt to acquire control of NAICO until the Director has approved the matter as required by law." (Resp. App. 20a-36a). **That same day M.J. Moroun** offered to purchase Chandler stock from the Universal Insurance Group. Dean Witter continued open market purchases under the name of **Norman E. Harned**. On Monday, July 13, 1992, Dean Witter continued purchasing Chandler stock but this time in the name of **Can-Am Investments, Ltd.** ("Can-Am"). The Nebraska Insurance Department ordered the Petitioners to file an application for change in control known as a Form A application.

Can-Am was incorporated by M. J. Moroun using CenTra employees and retirees, CenTra upper management and Moroun's father-in-law as purported shareholder "investors." However, these "independent" investors were not even approached to invest in Can-Am until early August — a month **after** the corporation had been formed and the purchases of Chandler stock had been completed. The shareholders of Can-Am gave sworn testimony by deposition some two and

one-half months after the purchases of Chandler stock ceased and shortly before the Department hearing. The testimony of Robert Berquist, Moroun's father-in-law and a director of Can-Am, best illustrates the total lack of knowledge and interest the supposedly independent investors have in their investment:

- He did not know what securities Can-Am would invest in;
- He did not pay his capital contribution until his deposition;
- He did not know whether the other shareholders had paid;
- He did not know of any shareholders meetings;
- He did not know when Can-Am was formed;
- He did not know where Can-Am was incorporated;
- He had not seen any articles or bylaws for Can-Am;
- He had not seen any minutes of any meetings;
- He had not seen any financial information on Can-Am;
- He did not know whether Can-Am had any assets;

- He did not know if Can-Am had any liabilities;

(Petition, A. 16). Although Can-Am commenced purchases on July 13, 1992, it was not even formally incorporated until the next day, July 14, 1992 (Resp. App. 37a). By July 13, 1992, Applicants had amassed ownership of 49.2% of Chandler's shares.[3]

The Department conducted the Form A hearing for five days in October of 1992. Applicants' request for control was denied. The Director held that three of the disqualifying conditions were present:

> (1) that the financial condition of the acquiring party is such as might jeopardize the financial stability of NAICO or **prejudice the interest of the policyholders** of the insurer,
>
> (2) that the competence, experience and integrity of the acquiring parties who would control the operation of NAICO are such that **it would not be in the interest of the policyholders** or NAICO or the public to permit the acquisition. and
>
> (3) that the acquisition is likely to be hazardous or prejudicial to the public.

(Petition, A. 46).

---

3. Petitioners' professed interest in assuring federal regulation of securities is interesting. At no time during the purchase of the Chandler securities during July 1992 did the Petitioners attempt to comply with the Williams Act. Indeed, they have continuously asserted that the Williams Act did not apply to their purchases.

In support of these findings, the Department found that the Petitioners were having cash flow problems and were in desperate need of cash. Moreover, the working capital of the Petitioners was greatly overstated and misleading. Indeed, CenTra had characterized at least one investment (its investment in Chandler stock) as "short term" to its accountants for the purpose of including it in working capital after characterizing it as "long term" to the Department for purpose of the Form A proceeding. DuraRock, CenTra's reinsurance subsidiary used in its fronting arrangement with NAICO, also had monetary problems. Testimony indicated that DuraRock's financial statements were likewise misstated and inflated. Further, the evidence showed that CenTra was operated as Moroun's "personal bank account." (Petition, A. 33-38).

Moreover, the Department found the Applicants had gone to great effort and expense to elude off-shore regulatory oversight and had failed to exhibit the degree of public trust necessary to control a Nebraska domestic insurance company. (Petition, A. 38, 41). This called into question the competence, experience and integrity of the Applicants. CenTra flouted the regulatory authority of both the Barbados Supervisor of Insurance, which regulated DuraRock, and the Department, which regulated NAICO. Despite repeated communications with the Department which clearly informed the Petitioners that approval of control was necessary **prior to** the purchase of stock, the Petitioners went ahead with their purchase plan without approval and in violation of the cease and desist orders. The Petitioners' own expert acknowledged that the violation of the cease and desist order might reflect on an applicant's integrity. (Petition, A. 41-42).

This conduct of CenTra before the Department led to the decision which CenTra argues violates the commerce clause, "usurps" the federal securities laws and "suspends trading" of

Chandler stock. The decision does none of this. Instead, the decision specifically addresses only the Chandler stock illegally held by Petitioners.[4] Since the Petitioners exhibited a propensity to ignore the orders of the Department and used straw men to indirectly accomplish what they could not do directly, the Department had to maintain control over the stock to insure that the Petitioners did not continue their illegal control by merely selling their stock in increments less than 10% to entities which they controlled. This order is directed at the "business of insurance" because it is aimed at the protection of the policyholders by regulating the persons in control of NAICO. This Order was necessitated by two unique facts in this case:

1. The fact that the Applicants had shown a propensity to ignore Department orders and use multifarious means to circumvent regulatory compliance, and

2. That Applicants had purchased the stock without **prior** regulatory approval as required by the statute, thus necessitating continued jurisdiction regarding the disposition of the stock.[5]

---

4. The ownership is illegal since control has been denied. The order was not entered by the Department sua sponte as indicated in the Petitioners Brief. Rather, the inclusion of the provision that CenTra should not dispose of its stock without prior approval of the Department was the continuation of a previously existing order which sought to maintain the status quo during the pendency of the action. The parties jointly sought and obtained this prior order.

5. If the Petitioners had sought approval before the purchase as required by the Nebraska Act, there would have been no need for this Order because when control was denied, there would be no stock to divest. Thus, the Order cannot be said to have far-reaching effect. In the normal situation there would be no need for an order of this kind. This conduct led the Nebraska Supreme

(Cont'd)

The decision does not offend the Constitution as alleged by Petitioners. Nor does it have far reaching affects. It is narrowly tailored to deal with the issue before the Department.

The District Court of Lancaster County, on a *de novo* review of the record, affirmed not only that the Petitioners were unfit to control NAICO but also that the decision was proper. The District Court noted that the Petitioners had not sought prior approval and that "for the Department to effectively carry out the purpose of the statute, it must have authority to handle situations of persons who purchase stock without prior approval." (Petition, A. 52). The purpose of the Nebraska Insurance Holding Company System Act ("Nebraska Act") was expressly found to be the "business of insurance": "The purpose of the Act is to protect the policyholders by probing the competence of those seeking to control insurance companies." (Petition, A. 52).

Similarly, the Nebraska Supreme Court held that the Department had the authority under the Nebraska Act and that the decision did not offend the commerce clause:

> The district court in this case found that the purpose of the Act is 'to protect the policyholders by probing the competence of those seeking to control insurance companies.' We agree with this finding. . . .
>
> With respect to the 'evils and mischiefs sought to be remedied' the Director of Insurance was presented with both a unique risk that NAICO policyholders could be

(Cont'd)
Court to conclude that the Director had the power under the Act to take appropriate action until policyholders' interests were no longer jeopardized by "outlaw corporate raiders". (Petition, A. 17).

subjected to needless prejudice by virtue of CenTra's acquisition and a **unique** opportunity to protect those policyholders . . . .

Beyond the problems experienced by Moroun entities in the past, however, the conduct of those entities in this litigation triggers legitimate concern that the only way for the department to protect NAICO policyholders is to retain jurisdiction over this matter and monitor applicants' disposition of their Chandler stock. No party may acquire statutory control of an insurer without department approval, yet the applicants boldly disregarded this very clear prohibition by amassing nearly five times that amount of stock specified for statutory control. That the applicants broke the law is so clear that the applicants do not even raise an objection to that finding. Even when the director issued his first cease and desist order, applicants unhesitatingly circumvented that order by creating a sham corporation, pausing not even long enough to explain to the sham corporation's new directors what its purpose would be . . . .

. . . Applicants unapologetic disregard for Nebraska law raises the specter of future disregard for the interests of NAICO policyholders. Accordingly, we find that the director should not be impeded in his choices of remedy and protective measures by the enumerated powers of the [Nebraska

Insurance Holding Company System] Act.

(Petition, A. 14-16).

It is against this backdrop that the Constitutional challenges raised by the Petitioners were addressed. While the Petitioners allege that they have previously asserted that the decision interferes with the federal securities laws and thus is violative of the Constitution, the Petitioners have never identified with which aspect of the securities laws the decision interferes. Indeed, the main issue briefed before the District Court of Lancaster County and the Nebraska Supreme Court was whether the decision related to "the business of insurance" and thus was exempted from federal regulation and the commerce clause by the MFA, or was otherwise an impermissible burden on interstate commerce.

In reaching its conclusion, the Nebraska Supreme Court relied upon *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969) for its analysis of the MFA issue. Consistent with this precedent, it held that since the Order and the Act from which it emanated were concerned with the protection of the policyholders, the Order involved the business of insurance and was thus preempted from the indirect application of the Commerce Clause by the MFA. The Supreme Court of Nebraska concluded that the Order did not usurp the federal securities laws as argued by the Petitioners here:

> This is not an instance of the department reaching out to invade the stock market. Rather, it was the applicants who wished to control the handling of CenTra's insurance claims; it was applicants who sought to gain control of their insurer by owning stock; and it was applicants who chose to cast into

> jeopardy the one policy concern for whose protection the Department was created: that an insurer should remain as reliable as it promises its insureds it will be. The director has not intruded into securities regulation. If anything, it is applicants who have intruded impermissibly into insurance regulation. The [Nebraska Insurance Holding Company System] Act affects entities outside the insurance industry only insofar as those entities choose to enter this rightly regulated arena.

(Petition, A. 21-22). Neither did the Nebraska Supreme Court agree that the Department's order "suspended trading" of Chandler securities: "Moreover the order is not an outright prohibition of stock sales by applicants, but only a prior-approval requirement: The order impedes applicants from nothing except skating around department authority." (Petition, A. 25).

Petitioners' hyperbole cannot alter the fact that the decision from which review is sought is narrowly tailored to the unique circumstances before the Department. What the Petitioners seek is nothing less than to render Nebraska incapable of regulating the ownership of insurance companies. Under Petitioners theory, a company could purchase stock without seeking prior approval, be denied the right to control, and leave the Department unable to regulate the disposal of the stock. Under this scenario, an unapproved purchaser would be free to dispose of illegally acquired stock to a straw man, and thereby always stay one jump ahead of the Department. The laws of Nebraska and of the United States do not permit such an absurd result.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ENUMERATED GROUNDS FOR WRIT OF CERTIORARI DO NOT SUPPORT GRANTING THE PETITION.

The Petitioners set forth three bases for this Court to grant Certiorari. None is meritorious. The arguments of the Petitioners ignore the factual basis for the Order and for the Nebraska Supreme Court's decision to uphold that Order and, instead, overstate the effect of the decision by claiming it causes the cessation of trading of Chandler stock. Nothing could be further from the truth. A review of the decision of the Nebraska Supreme Court clearly reveals that not only is the Order addressed to the "business of insurance", but it is narrowly tailored to the unique facts of this case. It simply does not have the far-reaching effects argued by Petitioners. The Petition should be denied.

A. The Decision of the Nebraska Supreme Court Is Not Contrary to Existing Supreme Court Precedent.

The first ground upon which the Petitioners seek a Writ of Certiorari is that the decision of the Nebraska Supreme Court is in conflict with decisions of the United States Supreme Court, state courts and Courts of Appeals. The Petitioners cited no state court cases or cases from any of the Federal Courts of Appeals which hold contrary to the Nebraska Supreme Court.[6] Nor do the

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6. Indeed, the only lower court cases the Respondents could locate were in accord with the holding of the Nebraska Supreme Court. *See Hoylake Investments Limited v. Gallinger*, 722 F. Supp. 573 (D. Ariz. 1989); *Hoylake Investments Limited v. Bell*, 723 F. Supp. 576, 578 (D. Kan. 1989); *Hoylake Investments Limited v. Washburn*, 723 F. Supp. 42 (N.D. Ill. 1989). *See also* dissent in *Allegheny Corporation v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990).

Petitioners cite a single United States Supreme Court case which is factually similar and holds contrary to the Nebraska Supreme Court. This is because no case has ever been decided that deals with the issues addressed by the Nebraska Supreme Court, primarily because, to the best of Chandler's knowledge, no other party has so blatantly ignored cease and desist orders of an insurance department coupled with the plain meaning of the Insurance Holding Company System Act. The Petitioners are left with the argument that the Nebraska Supreme Court's decision is inconsistent with existing general precedent of this Court. Their argument is without merit and misconstrues this Court's opinions.

The seminal case on Insurance Holding Company Acts and the commerce clause is *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969). Since that decision, the court has addressed the definition of "the business of insurance" for the purposes of the MFA in *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979), *Union Labor Life Insurance Company v Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) and *United States Department of the Treasury v. Fabe*, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993). None of these later cases reject the analysis in *National Securities*.

The holding of the Supreme Court in *SEC v. National Securities Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 261 (1969), which is relied upon by Petitioners, does not support the decision they seek. In *National Securities* the Arizona Insurance Commissioner approved a merger which the SEC sought to set aside for violation of SEC Rule 10b-5. The Arizona Insurance Commissioner made three findings pursuant to the Arizona Insurance Holding Company Act: (1) that the merger was not inequitable to the **stockholders**; (2) that its was not otherwise contrary to law; and (3) the merger would not substantially

reduce the security of service to the **policyholders**. **Only** that part of the Act which focused on the merger's effect on the stockholders was under attack. The Supreme Court found the MFA exempted from SEC scrutiny only those actions considered the "business of insurance". Thus, the Court concluded that the part of the statute aimed at **protecting the interests of stockholders** of insurance companies was not regulating insurance. 393 U.S. at 457. Its holding was expressly limited to the facts of the case before it. *Id.* at 462.

National Securities does not mean, however, that all aspects of the Insurance Holding Company System Act or orders promulgated thereunder concerning ownership or control of an insurance company are outside the scope of the MFA. Indeed, in *National Securities* the Court stated that the section of the statute which gave the Insurance Director the power to determine whether the securities transaction was in the best interest of the **policyholders** clearly related to the "business of insurance". *Id.* at 462. In this regard, the Supreme Court held that in defining the "business of insurance" the focus should be on the relationship of the insurer and insured and the **reliability** of the insurer. "Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'." *Id.* at 460.

In the instant case, the Department's Order focused on protecting the policyholder by insuring the reliability of the insurer. Since the focus of the Department's Order is the continued protection of the **policyholders** and viability of NAICO by insuring proper disposition by the disapproved Applicants of their illegally acquired stock, the Order relates to the business of insurance and is protected from the broad reach of the commerce clause. This is precisely the part of the *National Securities* case which was relied upon by the Nebraska Supreme Court to reach its decision that the Order dealt with "the business

of insurance" and was thus exempted from the application of federal regulation by the MFA. (Pl. A. at 22). No case decided by the Supreme Court since *National Securities* has rejected its analysis.

Indeed, in a very recent interpretation of "the business of insurance" under the first clause of Section 2(b) of the MFA, the Court relied upon the analysis of *National Securities*. In *United States Department of the Treasury v. Fabe*, *supra*, this Court addressed whether a state priority statute in insurance insolvency proceedings was preempted by the federal priority statute. The District Court had granted summary judgment for the United States relying upon the three part test set out in *Union Labor Life Insurance Company v Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). The Court of Appeals in applying the *Perino* test reversed the District Court. This Court began its analysis with *National Securities*. The Court noted that it had previously held that statutes "aimed at the protecting or regulating this relationship [between insurer and insured], directly or indirectly are laws regulating the business of insurance." *Fabe*, 113 S. Ct at 2208. Reliability was a fundamental part of the relationship between the insurer and insured. The *Fabe* Court then drew the same distinction as drawn by the Nebraska Supreme Court -- that the *National Securities* Court had held that only the part of the statute aimed at reviewing the transaction for the benefit of the security holders was invalid; **the section aimed at reviewing the stock transaction for the protection of the policyholder was valid.**

Moreover, the Petitioner in *Fabe*, like the Petitioners herein, sought to minimize this holding of *National Securities* and rely on the *Perino* and *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979) tests. The *Fabe* Court noted that *Perino* should not be read so narrowly to find that the "'business of insurance" is

confined entirely to the writing of insurance contracts as opposed to their performance." *Id.* at 2209. Rather, *Perino* and *Royal Drug* held only that ancillary activities which do not affect performance or enforcement of the insurance contract do not enjoy the antitrust exemption under the MFA.[7] The *Fabe* Court stated, "There can be no doubt that the actual performance of an insurance contract falls within the "business of insurance," as we understood that phrase in *Perino* and *Royal Drug*." *Id.* This is so because without performance of the insurance contract there is no risk transfer at all. Moreover, the performance of the contract is central to the policy relationship between insurer and insured and is confined to entities within the insurance industry. Since the Ohio statute in *Fabe*, to the extent it placed policyholder claims before the claims of the federal government, dealt with the performance of the insurance contract, it applied to the "business of insurance." Thus, even the three *Perino* factors were fulfilled. This Court held that the Ohio statute was not preempted by the federal priority statute.

Clearly, the analysis of the Court in *National Securities* is alive and well and entirely consistent with the three-prong test set out in *Perino* and the decision in *Royal Drug*. The decision of the Nebraska Supreme Court did not violate these existing precedents — it followed them. The Order was aimed at the

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7. This is an important distinction. Both *Perino and Royal Drug* involved the interpretation of the second clause of §2(b) of the MFA. This section provides an exemption from the anti-trust laws for certain state laws regulating the "business of insurance." As an exemption from the anti-trust laws, it must be narrowly construed. *See Perino*, 458 U.S. at 126 and *Royal Drug*, 440 U.S. at 218. At issue in *National Securities*, *Fabe* and this case is the general exemption of state laws regulating the "business of insurance" from the application of the commerce clause. The narrow construction rule does not apply. *Fabe*, 113 S. Ct. at 2209. The interpretation given the 'business of insurance" under *National Securities* and *Fabe* should be applied in this case.

protection of the policyholders of NAICO. The first prong of *Perino* is met because in protecting the integrity of an insurance company, one is transferring and spreading policyholder risk. Since the Order is aimed at the continued reliability of the insured's policy, it is central to the insurer/insured relationship. Thus the second prong is met. Finally, the Order is limited to entities in the insurance industry (*i.e.*, potential controlling stockholders of insurance companies). Not only is the Nebraska Supreme Court's decision consistent with *National Securities*, it is consistent with the interpretation given *Perino* and *Royal Drug* by this Court in *Fabe*. Petitioners' argument that the Nebraska Supreme Court's decision is contrary to existing Supreme Court precedent on the MFA is simply wrong. The Petition should be denied.

The Petitioners' argument that the Nebraska Supreme Court decision is contrary to existing Supreme Court holdings defining impermissible burdens on interstate commerce is likewise without merit. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) this Court addressed whether a state statute outside the insurance context violated the commerce clause. The Court held that the criteria for that determination was:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. at 142.

In *Pike*, the Court found that the state's interest in having its

name attached to a superior product was minimal and the burden imposed by the statute was significant. In that case, the statute was found to impermissibly burden interstate commerce.

The distinction between this case and *Pike* is clear. The state's interest in *Pike* was weak. The state's interest here is strong. This Court has recognized the important state interest in the regulation of the ownership of insurance companies for the protection of the policyholders. This strong state interest, coupled with the fact that the Order was required based upon unique facts and narrowly crafted to affect only the stock held by Petitioners, shows that the burden imposed was not clearly excessive in relation to the putative local benefits. The Nebraska Supreme Court's decision is not contrary to *Pike*.

In *Edgar v. MITE Corporation*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) the court addressed whether an Illinois anti-takeover statute outside the insurance context offended the commerce clause. In that case, the court found that when both a state and a federal statute attempted to regulate the same field, the state statute was void to the extent that it conflicted with the federal statute. A conflict is found if the state law stands as an obstacle to the accomplishment and execution of the federal statute. 457 U.S. at 631. More simply put, does the state statute make compliance with the federal securities laws impossible. In *Edgar*, the court found that the state statute made it impossible to comply with the Williams Act.

The analysis in *Edgar* is inapplicable here. While the Petitioners argue the Order interferes with "the federal securities laws", they fail to identify any federal securities with which it interferes. Indeed, in identifying the federal securities law which is implicated, the Petitioners merely refer to the **entire** Securities Act of 1933, 15 U.S.C. §§ 77a-77zzz and The Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78jjj. The Petitioners'

vagueness arises from their litigation position in this case that the Williams Act did not apply to their purchases of Chandler stock in 1992. Indeed, Petitioners made no attempts to comply with the Williams Act. There is no evidence that subjecting Petitioners' sale of Chandler stock to Department approval will contravene any federal securities law. Thus, under the *Edgar* rationale, there is no reason to find the decision to be an impermissible burden on interstate commerce.

The Nebraska Supreme Court conscientiously applied existing Supreme Court precedent to uphold the Order. There is nothing in its decision to merit the granting of a Writ of Certiorari. The Petition should be denied.

B. The Decision of the Nebraska Supreme Court Does Not Usurp Federal Securities Regulation.

Petitioners boldly state: "There is no link between the sale of stock by the Petitioners and a state interest in regulating the 'business of insurance' " in support of their argument that the decision usurps federal securities laws. The Petitioners go on to assert that the decision "marks the first time that any court has held that the business of insurance permits a state insurance regulator to suspend trading" of a corporation's stock. The record clearly reflects, however, that no suspension of trading has occurred — the Petitioners can sell their stock today with Department approval. The Petitioners' argument is overstated.

The decision cannot be reviewed in a vacuum as the Petitioners would have this Court do. The record clearly reflects the nexus between the Order and the "business of insurance." That nexus begins with the Nebraska Insurance Holding Company System Act which charges the Director to approve or disapprove an entity seeking control of a Nebraska insurance company through the ownership of securities. This Court upheld

this interest in *National Securities*. In this case, the nexus continues because Petitioners violated Insurance Department orders and bought stock without prior approval. The Director's jurisdiction to insure a divestiture in a manner to end control by Petitioners is essential. Each action by the Department was done for the purpose of protecting the policyholders of NAICO by insuring that NAICO was controlled only by entities fit to exercise that control. This is undoubtedly the business of insurance. The Nebraska decision ties strongly to the business of insurance.

The decision does not usurp the federal securities laws by "suspending the trading" of Chandler stock. As seen in *Edgar, supra*, the federal securities laws are only in issue if the decision somehow renders compliance impossible. In this case, Petitioners point to no specific federal securities law which the decision contravenes or a single federal securities law with which future compliance is impossible. Moreover, there is no suspension of trading of Chandler stock. The decision does not state that the Petitioners cannot sell their stock. It merely says the Department must approve their purchaser before the sale. In *National Securities* this Court found the Arizona act's provisions permitting insurance department review of the acquisition of control via the purchase of stock for the purpose of protecting the policyholder to be protected by the MFA. Nothing more is implicated here. Since the Petitioners had illegally purchased control of Chandler (and thus NAICO), which control was disapproved, the Department was required to assert continuing jurisdiction over disposition of that stock to ensure that the illegal control did not continue. There has been no order which results in the cessation of trading of Chandler stock. Chandler stock has continued to be publicly traded since July of 1992 when Petitioners attempted to buy control of Chandler.

Petitioners also assert that no other regulator has attempted

to regulate the **seller** of stock as opposed to the **purchaser.** However, the *National Securities* court clearly upheld the regulation of the **purchaser** of stock for the protection of the policyholders. In this case, the illegal purchases of stock by Petitioners necessitated the regulation of their divestiture of stock. The decision does no more than this — it tells a specific seller that it cannot sell to a specific purchaser unless that purchaser has been approved. The distinction Petitioners attempt to draw between regulation of a seller of stock rather than the purchaser of stock is meaningless. The Nebraska decision does not usurp the federal securities laws. It is narrowly tailored to address the particular circumstance before it.

C. Nothing in the *Barnett Bank* Decision Affects the Nebraska Supreme Court's Decision.

Petitioners begin this argument by asserting that there is a distinction between regulating the purchase of a security and the sale of a security. Petitioners imply there is something sacred about the sales transaction but not the purchase transaction. This argument must fail because every sales transaction involves a purchase and every purchase transaction a sale. It is a distinction without a difference. Moreover, this is irrelevant to the analysis in *Barnett Bank of Marion County v. Nelson,* __U.S. __, 116 S. Ct. 1103, __L. Ed. 2d __ (1996).

In *Barnett Bank*, the Court addressed the issue of whether a state law prohibiting a bank's sale of insurance, except in limited circumstances, was preempted by federal law which allowed a national bank to sell insurance. There was no issue in *Barnett Bank* under the first clause of § 1012(b) of the MFA. Rather, the Court's inquiry was directed at the second clause of § 1012(b) which provides that a federal statute may only preempt a state statute if it "specifically relates to the business of insurance."

In making this determination, the *Barnett Bank* court found that the word "relates" was general and should be interpreted broadly. 116 S. Ct. 1111. The federal bank statute specifically included grants of permission for the sale of insurance policies, the collection of premiums and the like. The Court found that the statute directly focused on industry specific selling practices and "affected the relation of insured to insurer and the spreading of risk—matters that this Court, in other contexts, has placed at the core of the McCarren-Ferguson Act's concerns." *Id.* at 1112. The court found that the state act was preempted by the federal act which specifically related to the business of insurance.

The issue before the Nebraska Supreme Court was much different. At issue there was whether the Order related to "the business of insurance" under the first clause of § 1012(b). The Nebraska Supreme Court was not directed to any specific federal securities law by the Petitioners claimed to be impacted by the Department's Order. Thus, *Barnett Bank's* review of whether a federal statute "specifically related to the business of insurance" was not reached. Moreover, the *Barnett Bank* decision adds nothing new to the general analysis of the MFA or commerce clause. *Barnett Bank*, in determining whether the federal statute "related to the business of insurance," applied the same case law analyzed by the Nebraska Supreme Court in its decision. Under general preemption analysis, the Court must first determine that an irreconcilable conflict between a state and federal statute exists. As discussed, above, there is no irreconcilable conflict in this case between the federal securities laws and the decision.

Like its other contentions, the Petitioners' claim that this Court's recent decision in *Barnett Bank* mandates the granting of a Writ of Certiorari is without factual or legal support. *Barnett Bank* did not distinguish, question, or overrule the existing precedent applied by the Nebraska Supreme Court. It provides no basis for the issuance of a Writ of Certiorari.

CONCLUSION

In attempting to convince this Court that a Writ of Certiorari should issue, Petitioners cast a wide net asserting that the decision suspends the trading of a registered security. No reading of the decision can support this broad contention. Rather, the decision was narrowly drawn to address the specific factual circumstances which were before the Court and Director. The decision has no affect on the federal securities laws or the commerce clause. The Petitioners are faced with a narrowly drawn order to right the wrong caused by Petitioners' own actions in an area traditionally left to regulation by the States and are attempting to "make a federal case out of it." This attempt should be rejected.

Respectfully submitted,

KENNETH N. McKINNEY
Counsel of Record
ROBERT L. ROARK
MARY E. NELSON
McKINNEY, STRINGER
& WEBSTER, P.C.
101 North Broadway
Oklahoma City, Oklahoma 73102
(405) 239-6444

WILLIAM M. LAMSON, JR.
MICHAEL DUGAN
KENNEDY, HOLLAND, DELACY
& SVOBODA
Kennedy Holland Building
10306 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 397-7824

Attorneys for Respondents

APPENDIX A — DEPARTMENTAL CORRESPONDENCE DATED JUNE 12, 1987

Departmental Correspondence

Date *June 12, 1987*

Subject *N.A.I.C.O. Investment*

To *Mr. M.J. Moroun* Department _____

From *V.E. Lacca* Department _____

Per your request, attached find a list of the states in which we are in the pools.

Attached also, find the premium schedule for the N.A.I.C.O. fronting program showing the liability program with annual premium of $8,715,620 and the compensation premium of $2,705,203 for a total premium of $11,420,823. Of this amount, $9,250,866 is ceded to Can-Am. The anticipated loss is estimated at $5,000,000 with a run off of about 5 1/2 years until all losses are paid. That would develope [sic] a surplus of $4,250,000 plus investment return on that amount and the $5,000,000 of reserves until it is used up.

By comparison, if we were to purchase insurance coverage, the workers compensation premium based upon 1986 payrolls would be $5,067,161 (see attached schedule) and the liability premium would be approximately $13,000,000 for a total premium of $18,000,000.

From an insurance point of view, the cost savings are a minor point in the decision to invest in N.A.I.C.O.

Appendix A

It is my opinion that regardless of how soft the market gets as to capacity, the cost will not come down from the present levels. There will be only a limited market, if any, available for fronting programs and none of them will allow you to either handle or control your claims. You will be required to put up collateral of about 200% of your estimated losses and cash deposit equivalent to at least three months of expected claims (based on the 200%).

You will be subjected to cancellations, non-renewals and rate increases.

Any advantage gained by use of Can-Am goes down the toilet.

Self insurance is not the solution. As per previous schedules, you cannot meet the financial requirements on some companies and the security and excess coverages will be in excess of what would make the program financially available.

The only way to get out of this problem is to have a controlled or at least influenced fronting company.

If we lock in N.A.I.C.O., we can,

1. Eliminate the problem of being at the mercy of the insurance industry.

2. Continue to enjoy cost savings based upon our good loss ratios.

3. Continue to control our claims and develope [sic] these good loss ratios.

4. Continue to use Liberty Bell and Can-Am at profit centers.

Appendix A

5. Continue to generate surplus at Can-Am to a point where we have the capacity to expand it outward to outside clients.

Without a locked in fronting company, we are back to taking whatever the insurance industry wants to throw out, if anything.

APPENDIX B — LETTER TO DAVID G. McLANE FROM N.E. HARNED AND R.W. LECH DATED JUNE 18, 1992

12225 Stephens
Warren, Michigan 48089-2010

June 18, 1992

David G. McLane, Esq.
Gardere & Wynne
3000 Thanksgiving Tower
Dallas, TX 75201-4761

RE: *Chandler Insurance Company, Inc.*

Dear David:

This letter is written to you in your capacity as officer in charge of keeping the corporate records of Chandler Insurance Co., Ltd. ("Company").

We hereby request that you provide us with a copy of the shareholder list of the Company, as we have received in the past, arranged in alphabetical order and showing the address of each shareholder and the number of shares of each class of shares registered in the name of each shareholder. The last shareholder list we have is dated March 22, 1991.

Additionally, we request the names, addresses and both business and home telephone numbers of each member of the board of directors of the Company for our records.

This information should be forwarded to us by facsimile transmission and by mail as soon as possible.

Appendix B

We have also copied the Company directly with respect to this letter. In the event that you are not the proper officer of the Company to whom this request should be addressed, we hereby request, by such copy of this letter, that the proper officer of the Company provide us with the requested information and we ask that you, in your capacities as an officer of and attorney for the Company, see that this request is properly complied with.

s/ N.E. Harned
N.E. Harned, Director

s/ R.W. Lech
R.W. Lech, Director or
Conditionally Elected Director

cc: Chandler Insurance Company, Ltd.
Attn: Benjamin Walkingstick
Brent LaGere
Mark Paden

APPENDIX C — LETTER TO JEANETTE SMITH FROM HANS H.J. PIJLS DATED JUNE 24, 1992

PLUNKETT & COONEY Professional Corporation
Attorneys and Counsellors at Law

900 Marquette Building
Detroit, MI 48226-3260

(313) 965-3900
Fax (313) 961-0029

June 24, 1992

VIA TELEFAX

Jeanette Smith, Esquire
General Counsel
Nebraska Department of Insurance
941 "O" Street, Suite 400
Lincoln, NB [sic] 68508

Dear Ms. Smith:

This office represents a client who currently owns 20-30% of the stock of a corporation which, in turn, through various subsidiaries, is a 100% owner of a Nebraska insurance company. Our client is contemplating the possibility of expanding its shareholding in the ultimate parent, and would like to know whether, in order to do so, it needs to satisfy any requirements of the Nebraska Insurance Company Holding Act. Specifically, the client would like to know what requirements, if any, it has met in the past, according to the records of the Department, and what additional requirements the company would need to meet in view of the past record.

In order to properly advise our client, we would appreciate receiving your written opinion in this regard.

Ms. Smith, thank you very much for your assistance in this matter.

Appendix C

Very truly yours,

Hans H.J. Pijls
Direct Dial: (313) 983-4846

HHJP/rjd

APPENDIX D — LETTER TO JEANETTE M. SMITH FROM J. MICHAEL GOTTSCHALK DATED JUNE 29, 1992

KUTAK ROCK
A Partnership
Including Professional Corporations
THE OMAHA BUILDING
1650 FARNAM STREET
OMAHA, NEBRASKA 58102-2185

(402) 346-6000
FACSIMILE (402) 346-1148

June 29, 1992

VIA FACSIMILE

Jeanette M. Smith, Esq.
General Counsel
Nebraska Department of Insurance
Suite 400
Terminal Building
941 O Street
Lincoln, NE 68508

Dear Ms. Smith:

As we briefly discussed during our telephone conference last Friday morning, CenTra Inc. has engaged our firm in conjunction with several matters arising from its partial ownership of Chandler Insurance Company, Ltd., the holding company of National American Insurance Company.

Michael E. Thoits, Esq., CenTra's principal counsel for this

matter, provided me with a copy of the June 24, 1992 letter you received from Hans H.J. Pijls of his firm. More important, after you and I spoke by telephone, Mr. Thoits confirmed that CenTra's only present request is for your assistance in obtaining copies of the Department's records with respect to CenTra itself and its subsidiaries National Transport Indemnity, Inc.

Specifically, CenTra's present management believe that several years ago it or one of its subsidiaries submitted a statement ("Statement") pursuant to Neb. Rev. Stat. § 44-2105 (Reissue 1988), the predecessor of Neb. Rev. Stat. § 44-2126 (1991 Supp.). This Statement apparently was submitted in conjunction with National American's merger into a Chandler subsidiary. It also appears the Department took affirmative action on the Statement by approving the contemplated transaction. CenTra presently requests only copies of this Statement and any attachments, and the Department's written action with respect to the Statement (and, if separate, with respect to the transaction which was the subject of the Statement).

CenTra acknowledges the obligations imposed upon the Department by Neb. Rev. Stat. § 44-2138 (1991 Supp.). The very limited documents it now seeks, however, do not appear to have been "disclosed to the Director . . . in the course of an examination or investigation . . . [or] reported pursuant to sections 44-2132 to 44-2136," nor otherwise to be within the intended purview of the records confidentiality statute.

CenTra likewise acknowledges the requested documents might be obtained either from Chandler or National American, or perhaps located through a more intensive search of its own stored files. Our client believes it is important to confirm the present

state of the Department's records, however, particularly to assure that any further action it may take with respect to its interest in Chandler is in full compliance with Nebraska law.

Thank you very much for your assistance with respect to CenTra's request. If you have any further questions regarding this matter, or require any additional information to locate and provide the limited records CenTra seeks, please call me.

Very truly yours,

s/ J. Michael Gottschalk
J. Michael Gottschalk

caa-m

cc: Michael E. Thoits, Esq.

APPENDIX E — LETTER TO MR. BRENT LaGERE FROM R.W. LECH DATED JULY 1, 1992

CENTRA, INC.
12225 STEPHENS ROAD
WARREN, MI 48089

July 1, 1992

W. Brent LaGere
Chairman and Chief
Executive Officer
1010 Manvel Avenue
Chandler, Oklahoma 74834

Dear Mr. LaGere:

This constitutes our offer to purchase from Chandler (U.S.A.), Inc., its parents, subsidiaries or affiliates, all of the shares of Chandler Insurance Co. Ltd. held as pledgee of Universal Insurance Group (approximately 400,000 shares) and as pledgee of Cal-Tex Group (approximately 170,000 shares) for the purchase price of $7.50 per share, payable in cash within five (5) days of acceptance of this offer.

Please let us hear from you. By copy of this letter, we are notifying each of the pledgors of this offer as it is our understanding that they are entitled to receive the benefits of this offer.

Very truly yours,

CENTRA, INC.

By: s/ R.W. Lech
Its: Executive Vice President

cc: Bruce S.D. Putterill

APPENDIX F — LETTER TO CHANDLER (U.S.A.), INC. ATTN: MR. BRENT LAGERE FROM R.W. LECH DATED JULY 2, 1992

CenTra, Inc.
12225 Stephens Road
Warren, Michigan 48089

July 2, 1992

VIA MAIL AND TELECOPIER — (405) 258-0175

Chandler (U.S.A.), Inc.
P.O. Drawer 9
Chandler, Oklahoma 74834

Attn: Mr. Brent LaGere

Re: Chandler Insurance Company, Ltd.

Gentlemen:

This constitutes our offer to purchase from Chandler (U.S.A.), Inc. the approximately 567,350 shares of Chandler Insurance Company, Ltd. owned by Chandler (U.S.A.), Inc. for the purchase price of $7.50 per share, payable in cash within five business days after receipt of your written acceptance of this offer.

We understand that the total number of shares owned by you is 567,350. If our understanding as to the total number of shares owned by you is incorrect, this offer will continue to apply to the total amount of shares in Chandler Insurance Company, Ltd. owned by you (up to but not exceeding 600,000 shares).

Appendix F

Please respond as to your acceptance or rejection of this offer in writing. This offer will remain open until withdrawn by us in writing (even if rejected by you).

CENTRA, INC.

By: s/ R.W. Lech
R.W. Lech, Executive Vice President

xc: Mr. Bruce S.D. Putterill

APPENDIX G — LETTER TO NATIONAL AMERICAN INSURANCE COMPANY ATTN: MR. BRENT LaGERE FROM R. W. LECH DATED JULY 2, 1992

CenTra, Inc.
12225 Stephens Road
Warren, Michigan 48089

July 2, 1992

VIA MAIL AND TELECOPIER — (405) 258-0175

National American Insurance Company
c/o Chandler (U.S.A.), Inc.
P.O. Drawer 9
Chandler, Oklahoma 74834

Attn: Mr. Brent LaGere

Re: Chandler Insurance Company, Ltd.

Gentlemen:

We understand that you are or may be the beneficiary of a pledge of shares in Chandler Insurance Company, Ltd. On July 01, 1992, an offer to purchase those shares was made by us. A copy of our offer is attached hereto.

This letter confirms that our offer remains outstanding and will remain outstanding until withdrawn in writing by us (even if rejected by you). We ask that our offer be accepted in writing.

Appendix G

CENTRA, INC.

By: s/ R.W. Lech
R.W. Lech, Executive Vice President

xc: Mr. Bruce S.D. Putterill
Universal Insurance Services
Cal-Tex

APPENDIX H — PRESS RELEASE DATED JULY 6, 1992

JUL-6-92 MON 12:56 SN OPERATION ROWENA
FAX NO. 4058404171 P.02

NEWS CODE S ENTRY CHANF DATE 12:43 PM FRWD
PAGE 1 OF 2

1 07/06 CENTRA MAY BUY 169,858 SHARES OF CHANDLER INSUR FROM HOLDER DJ

WASHINGTON -DJ- CENTRA INC., WHICH PREVIOUSLY SAID IT OPPOSES A PROPOSED MANAGEMENT BUY-OUT OF THE CHANDLER INSURANCE CO. (CHANF), SAID THAT A CHANDLER SHAREHOLDER HAS INDICATED THAT IT IS WILLING TO SELL CENTRA 169,858 CHANDLER SHARES.

AS REPORTED, CENTRA, WHICH HOLDS A 21.8% STAKE IN THE COMPANY, SAID THAT IT MIGHT BUY MORE SHARES IN AN EFFORT TO INFLUENCE THE COMPANY'S MANAGEMENT AND BOARD. CENTRA OFFERED ON JULY 1 TO PURCHASE ABOUT 570,000 CHANDLER INSURANCE SHARES HELD BY THE COMPANY OR ITS SUBSIDIARIES FOR $7.50 A SHARE. CHANDLER REJECTED THAT OFFER AND SAID SUCH PURCHASES WOULD VIOLATE AN EXISTING CONTRACTUAL AGREEMENT WITH THIRD PARTIES.

IN A FILING WITH THE SECURITIES AND EXCHANGE COMMISSION, CENTRA SAID THAT ALTHOUGH THE COMPANY DECLINED TO SELL IT THE ABOUT 570,000 SHARES, CACTUS SOUTHWEST CORP., ONE OF THE ACTUAL OWNERS OF 169,853 SHARES, HAS "INDICATED ITS WILLINGNESS" TO SELL THE SHARES TO CENTRA.

Appendix H

THE FILING INDICATED THAT A TENTATIVE UNDERSTANDING HAS BEEN REACHED BUT NO AGREEMENT HAS BEEN EXECUTED AND THAT THE UNDERSTANDING CALLS FOR THE PURCHASE OF THE SHARES AT $7.50 PER SHARE.

CENTRA SAID THAT ON JULY 2 IT MADE AN OFFER TO CHANDLER (U.S.A.) INC., A

NEWS CODE S ENTRY CHANF DATE 12:43 PM LAST PAGE 2 OF 2

1 07/06 CENTRA MAY BUY 169,858 SHARES OF CHANDLER INSUR FROM HOLDER DJ UNIT OF THE COMPANY, TO PURCHASE ABOUT 567,350 OTHER SHARES OF CHANDLER FOR $7.50 A SHARE. NO REPLY HAS BEEN RECEIVED, CENTRA SAID.

APPENDIX I — LETTER TO J. MICHAEL GOTTSCHALK FROM JEANETTE M. SMITH DATED JUNE 30, 1992

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE
William H. McCartney
Director

E. Benjamin Nelson
Governor

June 30, 1992

Mr. J. Michael Gottschalk
Kutak Rock
1550 Farnam Street
Omaha, NE 68102

Dear Mr. Gottschalk:

I have reviewed your letter and the relevant files in light of Neb. Rev. Stat. § 44-2138. The Department's position is that holding company files are not public records. However, to the extent that an order is entered by the Director pursuant to the Holding Company Act, that order would be a public record. Upon review, there has been no order entered approving a Form A filing by CenTra regarding acquisition of control of National American Insurance Company.

As I explained to Hans Pijls over the telephone, generally if an entity or individual which currently owns 20-30% of the stock of the corporation which in turn through subsidiaries is a 100% owner of a Nebraska insurance company and it wishes to expand its shareholdings, Nebraska filing requirements would depend upon prior historical filings with us. Since there is no order approving a Form A filing, any expansion of CenTra's current holdings would require either a Form A (§44-2126) or a

disclaimer of control rebutting the presumption (§44-2132(11)) filed with the Department for approval prior to the new proposed transaction occurring. Control is presumed to exist if any person directly or indirectly holds 10% of the voting securities of any other person. See Neb. Rev. Stat. § 44-2121(2).

If a Form A had been filed, the Department would have entered an order approving the acquisition of control. Under that hypothetical scenario, if the entity subsequently expanded its holdings from 20% to 99% of the corporation it would make no difference and would not necessitate any further approval since the acquisition of control had received approval.

Perhaps we have a different interpretation of the confidentiality statute specifically contained in the Holding Company Act located at Neb. Rev. Stat. § 44-2138. The section which I feel is pertinent is the language which states ". . . and all information reported pursuant to Sections 44-2132 to 44-2136 shall be given confidential treatment . . . " The information which your client seeks, is arguably the information which was reported to the Department as required by the Holding Company Act. I trust the general information which I have stated in this letter will be of benefit and will hopefully answer Mr. Pijl's original questions. To the extent that specific information is required, I again suggest that your client contact National American Insurance Company. If you'd like to discuss further please give me a call.

Sincerely,

s/ Jeanette M. Smith
JEANETTE M. SMITH
General Counsel

JMS:mkr

cc: Hans Pijls

APPENDIX J — ORDER AND NOTICE OF HEARING FILED JULY 10, 1992 WITH EXHIBITS ATTACHED

BEFORE THE DEPARTMENT OF INSURANCE
STATE OF NEBRASKA

C-755

IN THE MATTER OF ACQUISITION OF NATIONAL AMERICAN INSURANCE COMPANY, BY CENTRA, INC.

ORDER TO CEASE AND DESIST AND NOTICE OF HEARING ON APPLICATION TO ACQUIRE NATIONAL AMERICAN INSURANCE COMPANY

TO: CenTra, Inc., its affiliates and R. W. Lech, M. J. Moroun and Norman E. Harned, individuals.

The Director of the Nebraska Department of Insurance and his duly authorized Deputy are charged with the duty and power to enforce and execute all the insurance laws of this State which include Neb.Rev.Stat. §§44-2120 through 44-2153 (Nebraska Insurance Holding Company Act).

On July 9 , 1992 , CenTra, Inc ., a Delaware corporation, filed an application pursuant to Neb.Rev.Stat. §44-2126 to acquire control of National American Insurance Company (NAICO), a Nebraska domestic insurer.

Since that time, the Director of Insurance, by and through its Deputy, Robert G. Lange, has reasonable cause to believe that CenTra, Inc., by and through its officers and directors and/or its affiliates (hereafter CenTra) are attempting to immediately acquire control of NAICO in violation of Neb.Rev.Stat. §44-2126 in that CenTra has failed to obtain prior approval of the

acquisition of NAICO from the Director. The Director has reasonable cause to believe such acquisition or attempted acquisition has or is occuring based upon the following:

(l) Attached as exhibit 1, an affidavit of R. Patrick Gilmore, Assistant Secretary and General Counsel to NAICO attesting on his information and belief that CenTra has acquired or is in the process of acquiring additional holdings of Chandler Insurance Company, Ltd. of the Caymen [sic] Islands (Caymen) [sic] which is the ultimate controlling person of a Nebraska domestic insurance company, National American Insurance Company (NAICO).

(2) CenTra has not received prior written approval from the Director to acquire or attempt to acquire additional holdings as is required under the Nebraska Insurance Holding Company System Act (Neb.Rev.Stat. §44-2120 et sec.).

(3) On July 7, 1992, the Department issued a letter, attached as exhibit #2, ordering CenTra to immediately cease and desist from engaging in any further conduct that constitute the making of a tender offer, invitation for a tender offer, the entering into any agreement or any attempt whatsoever to acquire stock of Chandler Insurance Company, Ltd. of the Caymen [sic] Islands unless and until CenTra has filed a Form A with the Director pursuant to §44-2126(1) and the Director has approved such acquisition following a public hearing as required under §44-2127.

(4) On July 8, 1992, the Department reaffirmed its

position that CenTra should immediately cease and desist from such activity until a Form A has been filed and approved by the Director as set forth in exhibit #3, a copy of which is attached hereto.

(5) A Form A filing was filed with the Department on July 9, 1992. There has been no approval of the Form A filing at this time. A public hearing has been set for August 6, 1992, to consider the matter pursuant Neb.Rev.Stat. §44-2127.

(6) That the aforementioned facts constitute violations of the Nebraska Insurance Holding Company System Act and fall within the purview of the Department's authority to exercise its powers and to protect residents and policyholders of this State.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that CenTra, Inc., its officers and directors, and its affiliates, are hereby ordered to immediately CEASE AND DESIST from any and all attempts to acquire or purchase, conditionally, or otherwise, directly by CenTra or indirectly by its affiliates, or in any other manner acquire or attempt to acquire control of NAICO until the Director has approved the matter as required by law.

Dated this 10 day of July, 1992.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE

s/ Robert G. Lange
BY: ROBERT G. LANGE
DEPUTY DIRECTOR

Appendix J

NOTICE OF HEARING

You are hereby notified that the Nebraska Department of Insurance shall conduct a public hearing pursuant to Nebraska Revised Statutes §44-2127 on the application of CenTra, Inc. to acquire control of National American Insurance Company, a Nebraska domestic insurer. Said hearing will be held at the offices of the Nebraska Department of Insurance, Terminal Building, 941 "O" Street, Suite 400, Lower Level Conference Room, on Thursday, August 6, 1992, at 9:00 a.m. and shall continue until concluded.

Dated this 10 day of July , 1992.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE

s/ Robert G. Lange
BY: ROBERT G. LANGE
DEPUTY DIRECTOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order to Cease and Desist and Notice of Hearing on Application to Acquire National American Insurance Company was served upon the following persons by facsimile and certified mail, return receipt requested, on this 10 day of July, 1992:

R. W. Lech
M. J. Moroun
Norman E. Harned
CenTra, Inc.
1225 Stephens
Warren, MI 48089-2010

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Michael E. Thoits, Esq.
Plunkett & Cooney
900 Marquette Building
Detroit, MI 48226-3260

J. Michael Gottschalk, Esq.
Kutak Rock
1650 Farnam Street
Omaha, NE 68102

s/ Susan Kuzelka

[handwritten]
7-13-92
Copy hand delivered to Pat Gilmore,
General Counsel for Nat'l American

Appendix J

EXHIBIT 1

AFFIDAVIT

The undersigned, being first duly sworn upon oath, deposes and states as follows:

1. That he is of lawful age and that his name is R. Patrick Gilmore, one and the same person as Robert Patrick Gilmore, Robert P. Gilmore or "Pat" Gilmore.

2. That he is Assistant Secretary of and General Counsel to the following corporations which are subject to the Insurance Holding Company System Act (the ACT) of the State of Nebraska:

Chandler (U.S.A.), Inc., an Oklahoma corporation (CHANDLER U.S.A.)

National American Insurance Company, a Nebraska Corporation (NAICO)

3. That he is an attorney at law duly licensed to practice law in the State of Oklahoma and is counsel to the following corporations which are subject to the ACT:

Chandler Insurance Company, Ltd., a Cayman Islands Corporation (CHANDLER CAYMAN)

Chandler Insurance (Barbados), Ltd. (CHANDLER BARBADOS)

4. That the following facts are true according to the books and records of the corporations named below:

Appendix J

(a) NAICO is a wholly owned subsidiary of CHANDLER U.S.A.

(b) CHANDLER U.S.A. is a wholly owned subsidiary of CHANDLER BARBADOS

(c) CHANDLER BARBADOS is a wholly owned subsidiary of CHANDLER CAYMAN

(d) CHANDLER CAYMAN is a publicly traded company

5. That the current members of the Board of Directors of NAICO are:

Brent LaGere
Benjamin T. Walkingstick
Robert A. Anderson
Michael J. Dugan
James M. Jacoby
Ronald W. Lech
W. Tim Runyan

6. That the current members of the Board of Directors of CHANDLER CAYMAN are:

Brenda B. Pair
W. Brent LaGere
Richard L. Evans
Norman E. Harned
L. Keith Price
Benjamin T. Walkingstick
Robert L. Rice

Appendix J

Paul A. Maestri
Mark T. Paden
M. J. Moroun
Ronald W. Lech

7. That M. J. Moroun, Ronald W. Lech and Norman E. Harned are officers and/or employees of CenTra, Inc. which together with affiliates owns 22.7% of the outstanding capital stock of CHANDLER CAYMAN. After July 1, 1992, CenTra, Inc. negotiated to purchase stock of CHANDLER CAYMAN amounting to approximately 8% of the outstanding stock at $7.50 per share.

8. That on July 9, 1992, Windsor Acquisition Corp., an Oklahoma corporation (WINDSOR) announced its intention to purchase all of the outstanding capital stock of CHANDLER CAYMAN at a price of $6.50 per share subject to certain conditions. (The TENDER OFFER)

9. That WINDSOR is a wholly owned subsidiary of CHANDLER BARBADOS and thus is a part of the same holding company system. The undersigned is President of WINDSOR.

10. That on July 9, 1992, the Board of Directors of CHANDLER CAYMAN met at a special meeting at Windsor, Ontario, Canada for the purpose of discussing the TENDER OFFER.

11. CenTra, Inc. (and specifically, Mr. Lech) had been ordered by the Nebraska Insurance Department on July 7, 1992, to "immediately Cease and Desist from engaging in any further conduct that would constitute . . . any attempt whatsoever to acquire stock of NAICO unless and until CenTra has filed a Form

A with the Director . . . and the Director has approved such acquisition following a public hearing . . ."

12. That at the CHANDLER CAYMAN Board Meeting held on July 9, 1992, Mr. Lech (who is a director of both CHANDLER CAYMAN and NAICO) acknowledged his awareness of the order and made the following statements:

(a) That as soon as the Form A and a Disclaimer was filed his group intended to purchase CHANDLER CAYMAN stock on the open market to acquire control of CHANDLER CAYMAN.

(b) That a close friend of Mr. Lech's who is an officer of National Indemnity Insurance Company would manage NAICO.

(c) That Deputy Insurance Commissioner, Robert Lange, had given his group permission to commence the purchase of CHANDLER CAYMAN stock upon the filing of a Form A statement with an accompanying disclaimer.

13. That during the course of the Board Meeting a telecopy transmission intended for Mr. Harned was mistakenly delivered to the undersigned. The telecopy was from an office of the Dean Witter Brokerage Firm and appeared to be a request for approval of a press release purporting to state, inter alia, that the Nebraska Insurance Department had asked CenTra to refrain from dealing in the Chandler Cayman stock. The release appeared to be a paraphrase of an earlier release by WINDSOR stating that the Nebraska Insurance Department had ordered CenTra to cease dealing in such stock. The telecopy also contained certain stock market information.

14. Subsequent to the adjournment of the Board Meeting,

the undersigned also observed a second telecopy transmission from the same brokerage firm being delivered to Mr. Harned at approximately 1:00 p.m. E.D.T.

15. At approximately 3:45 C.D.T., the undersigned was informed that large blocks of stock of CHANDLER CAYMAN had been purchased on the open market for in excess of $6.50 per share. Prior to July 9, 1992, such stock had not traded for a price in excess of $6.00 per share for at least six (6) months.

16. The undersigned has been informed and states upon information and belief that throughout the entire day of July 9, 1992, the Dean Witter Brokerage Firm was trading in the CHANDLER CAYMAN stock upon the instructions of Messrs. Moroun, Lech and Harned and that after adjournment of the CHANDLER CAYMAN Board Meeting began to purchase the stock at a price of more than $6.50 per share. It appears that approximately 208,000 shares traded at more than $6.50 per share after 2:00 p.m. C.D.T. and that most, if not all of such stock was purchased by the Dean Witter Brokerage Firm.

17. That subsequent to the issuance of the Department's order of July 7, 1992, and after notice of such order had been delivered to Mr. Lech, and at the very time that Mr. Lech was meeting with Robert Lange in Lincoln, Nebraska, on July 8, 1992, the CenTra Group continued to negotiate with the Cactus Southwest group for the purchase of 169,858 shares of CHANDLER CAYMAN stock and was requesting the execution of a document by Cactus Southwest committing to sell such stock to the CenTra Group.

18. That the actions of Mr. Moroun, Mr. Lech and Mr. Harned described above have as their purpose influencing the

management and control of NAICO. That the acquisitions made on July 9, 1992, have greatly enhanced Mr. Moroun's, Mr. Lech's and Mr. Harned's ability to control NAICO.

Dated, subscribed and sworn to this 10th day of July, 1992.

s/ R. Patrick Gilmore
R. Patrick Gilmore

STATE OF NEBRASKA)
) ss
COUNTY OF LANCASTER)

Subscribed and sworn to before me this 10th day of July, 1992, by R. Patrick Gilmore.

s/ Helen E. Griffin
Notary Public

My Comm. Expires:

2-8-95

(SEAL)

Appendix J

EXHIBIT 2

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE
William H. McCartney
Director

E. Benjamin Nelson
Governor

July 7, 1992

FACSIMILE
CERTIFIED: RETURN RECEIPT REQUESTED

Mr. R. W. Lech
Executive Vice-President
CenTra, Inc.
12225 Stephens Road
Warren, MI 48089

Dear Mr. Lech:

Information and evidence made available to the Department of Insurance indicates that CenTra, Inc. is pursuing steps to immediately increase its holdings of a Nebraska domestic insurance company, National American Insurance Company (NAICO). However, such attempt to acquire NAICO disregards the requirements of the Nebraska Holding Company Systems Act, specifically Neb.Rev.Stat. §44-2126(1). That provision prohibits any person other than the issuer to make a tender offer for, or otherwise seek to acquire any voting security of a domestic insurer where such person would by exercise of any right to acquire, be in control of such an insurer unless such offer

first has been approved by the Director. As a prerequisite to approval, a Form A filing must be submitted to the Director in accordance with Chapter 24, Nebraska Administrative Code, §019. Control is presumed where ownership exceeds 10% of voting stock in one person unless a disclaimer of control is filed with the Department.

According to Department holding company records, CenTra and its affiliates own approximately 22.53% of the total issued and outstanding common stock of Chandler Insurance Company, Ltd., the ultimate controlling person of NAICO. Our records further indicate that a disclaimer of control over NAICO was filed by CenTra in approximately February, 1989. A Form A filing has not been submitted to this Department by CenTra since that time.

To the best of our knowledge and belief CenTra nevertheless is attempting to acquire control over NAICO without approval of such acquisition first having been granted by the Director. The evidence available to the Department indicating such attempted acquisition includes the following documents:

1. Letter to Mr. Brent LaGere dated July 1, 1992 wherein CenTra offers to purchase from Chandler (U.S.A.), Inc., all the shares of Chandler Insurance Company, Ltd.;

2. Letter to Mr. Brent LaGere dated July 2, 1992 wherein CenTra, Inc. again offers to purchase from Chandler (U.S.A.), Inc. approximately 567,050 shares of stock of Chandler Insurance Company, Ltd. which is owned by Chandler (U.S.A.), Inc., constituting the total number of shares owned by Chandler (U.S.A.), Inc.;

Appendix J

3. Press release dated July 6, 12:43 p.m. evidencing a proposal to buy 169,858 shares from Cactus Southwest Corp.; and

4. Schedule 13D filing made with the Securities and Exchange Commission on July 1, 1992, summarizing the above proposals.

Please be advised that any attempt to increase its holdings over NAICO without filing a Form A with the Department upon which the Director must give approval thereto is in violation of Nebraska Insurance Code, §§44-2126(1) and 44-2129(2). Consequently, the Director is hereby ordering CenTra, Inc. to immedately CEASE and DESIST from engaging in any further conduct that would constitute the making of a tender offer, invitation for a tender offer, the entering into any agreement or any attempt whatsoever to acquire stock of NAICO unless and until CenTra has filed a Form A with the Director pursuant to §44-2126(1) and the Director has approved such acquisition following a public hearing as required under §44-2127.

The Department is prepared to apply to the District Court of Lancaster County, Nebraska to enjoin CenTra, Inc. from any further acquisition attempts over NAICO and to prevent CenTra, Inc. from continuing to violate the Holding Company Systems Act. See §44-2140. The Department is also prepared to seek imposition of monetary penalties against any officer or agent in his individual capacity, to the extent necessary to enforce compliance with the Nebraska Holding Company Systems Act.

Appendix J

Sincerely,

s/ Robert G. Lange
ROBERT G. LANGE
Deputy Director

RGL:mkr

cc: Jeanette Smith
Ann Frohman

Appendix J

EXHIBIT 3

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE
William H. McCartney
Director

E. Benjamin Nelson
Governor

July 8, 1992

FACSIMILE
U.S. MAIL

Mr. R. W. Lech
Executive Vice-President
CenTra, Inc.
12225 Stephens Road
Warren, MI 48089

Dear Mr. Lech:

This letter serves to follow-up our meeting yesterday and to correct a statement in my letter to you dated July 7, 1992. We concluded the meeting with an understanding that CenTra will be filing a Form A as soon as possible. The Department will review the filing and will then advise you of a hearing date on the matter. The hearing will be held at the Nebraska Insurance Department in approximately 30 days after receipt of the filing.

On a related matter, there was an erroneous reference on the second page of my July 7th letter regarding CenTra Inc.'s acquisition of "stock of NAICO," which is not technically

accurate. For further clarification, the conduct to which I was referring throughout that letter as conduct which violates Nebraska's Holding Company Systems Act and therefore should immediately cease until a Form A has been filed and approved by the Director, centers not on CenTra's efforts to acquire stock of NAICO but pertains to CenTra's efforts to acquire the stock of Chandler Insurance Company Ltd., which the Department understands is the ultimate controlling person of National American Insurance Company.

Sincerely,

s/ Robert G. Lange
ROBERT G. LANGE
Deputy Director

cc: Jeanette Smith
Ann Frohman

APPENDIX K — CERTIFICATE OF INCORPORATION

IBC 01

Commonwealth of The Bahamas

The International Business Companies Act 1990

Certificate of Incorporation
(Section 11 and 12)

No. 10,119B CAN-AM INVESTMENTS LIMITED

I, SHANE MILLER Assistant *Registrar General of the Commonwealth of The Bahamas Do Hereby Certify pursuant to the International Business Companies Act (No. 2 of 1990) that all the requirements of the said Act in respect of incorporation have been satisfied, and that*

CAN-AM INVESTMENTS LIMITED

is incorporated in the Commonwealth of The Bahamas as an International Business Company this 14th *day of* July 1992

Given under my hand and seal at Nassau in the Commonwealth of The Bahamas

s/ Shane Miller
ASSISTANT REGISTRAR GENERAL